Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1954

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PUBLICATION OF THIS DOCUMENT APPROVED BY GEORGE J. CRONIN, STATE PURCHASING AGENT.

1100-12-55-916453.

The Commonwealth of Massachusetts

BOSTON, December 1, 1954.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1954.

Respectfully submitted,

GEORGE FINGOLD,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
GEORGE FINGOLD

First Assistant Attorney General
FRED WINSLOW FISHER

Assistant Attorneys General

JASON A. AISNER[1]
HARRIS J. BOORAS[2]
SAMUEL H. COHEN[3]
MALCOLM M. DONAHUE
JOSEPH H. ELCOCK, Jr.
DANIEL J. FINN[1]
DORICE S. GRACE
SAUL GURVITZ
MATTHEW S. HEAPHY
JAMES F. MAHAN
CHARLES F. MARSLAND, Jr.[1]
LOWELL S. NICHOLSON[4]
JOHN V. PHELAN
HARRIS A. REYNOLDS
WILLIAM J. ROBINSON
ARNOLD H. SALISBURY
BARNET SMOLA
NORRIS M. SUPRENANT
ANDREW T. TRODDEN

Assistant Attorneys General assigned to Department of Public Works

VINCENT J. CELIA
JAMES C. GAHAN, Jr.
FLOYD H. GILBERT
MAX ROSENBLATT
DAVID L. WINER

Special Assistant Attorney General assigned to Department of Public Works
FRANK RAMACORTI

Assistant Attorneys General assigned to Division of Employment Security

LAZARUS AARONSON[5]
STEPHEN F. LOPIANO, Jr.

Assistant Attorney General assigned to Office of State Rent Co-ordinator
HUGH MORTON

Assistant Attorneys General assigned to State Housing Board

MILTON ABELSON
KEESLER H. MONTGOMERY
JOSEPH H. SHARRILLO[4]

Assistant Attorney General assigned to Veterans' Division
FRED L. TRUE, Jr.

Chief Clerk to the Attorney General
HAROLD J. WELCH

Administrative Legal Consultant to the Attorney General
JAMES J. KELLEHER

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[1] Appointed July 20, 1953.
[2] Resigned Dec. 4, 1953.
[3] Appointed Nov. 17, 1953.
[4] Appointed Jan. 1, 1954.
[5] Appointed Apr. 9, 1954.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year, July 1, 1953, to June 30, 1954

Appropriations.

Attorney General's Salary	$12,000 00
Administration, Personal Services and Expenses	249,355 00
Claims, Damages by State Owned Cars	35,000 00
Small Claims	15,000 00
New York, New Haven and Hartford Railroad Investigation (Old Colony Division)	1,470 77
Veterans' Legal Assistance	19,000 00
Total	$331,825 77

Expenditures.

Attorney General's Salary	$12,000 00
Administration, Personal Services and Expenses	248,628 96
Claims, Damages by State Owned Cars	35,000 00
Small Claims	15,000 00
New York, New Haven and Hartford Railroad Investigation (Old Colony Division)	1,466 37
Veterans' Legal Assistance	18,627 17
Total	$330,722 50

Financial statement verified (under requirements of c. 7, § 19, of the General Laws), November 16, 1954.

Approved for publishing.

FRED A. MONCEWICZ,
Comptroller.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, December 1, 1954.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, as amended, I herewith submit my report.

The cases requiring the attention of this department during the fiscal year ending June 30, 1954, totaling 16,175, are tabulated as follows:

Extradition and interstate rendition	90
Land Court petitions	126
Land damage cases arising from the taking of land:	
Department of Public Works	972
Metropolitan District Commission	173
Department of Mental Health	3
Department of Education	2
Armory Commission	1
Department of Conservation	1
Department of Public Utilities	1
New Bedford Textile Institute	1
Miscellaneous cases, including suits for the collection of money due the Commonwealth	5,453
Estates involving application of funds given to public charities	1,032
Settlement cases for support of persons in State institutions	32
Pardons:	
Investigations and recommendations in accordance with G. L. c. 127, § 152, as amended	37
Workmen's compensation cases, first reports	4,612
Cases in behalf of Division of Employment Security	605
Cases in behalf of Veterans' Division	3,034
	16,175

In the Attorney General's last annual report, filed with the Secretary of State one year ago, attention was called to the fact that the department is the legal counsel for a multi-billion dollar business — the Commonwealth of Massachusetts.

It was also pointed out that as such, the department's duties are manifold and varied and that the already grave and heavy responsibilities of the office of Attorney General are ever increasing.

Events of the 12 months of the fiscal year July 1, 1953, to June 30, 1954, more than justify those statements.

The office of the Attorney General has sponsored new legislation, created new divisions within the department, rendered legal opinions to the proper authorities, represented the Commonwealth and the various State departments, officers and commissions in all judicial proceedings, examined and approved town by-laws, conducted investigations into the conduct of various agencies and certain public officials of the Commonwealth, cooperated with the district attorneys, conscientiously administered the law and vigorously prosecuted all violators.

And yet, as time-consuming as these many activities have been, the office of Attorney General has also been able to give assistance to the needy, such as the unfortunate victims of the disastrous Worcester tornado and the hurricane on Cape Cod, continue economical land-taking reforms, initiate a campaign to clean up comic books and continue aid to veterans.

Staffed by a corps of Assistant Attorneys General and law clerks whose character, ability, experience and training are above question, the office of the Attorney General also continued its drives against Communism, crime and corruption, took action against fake charities, established a Division of Charitable Trusts within the department and carried out a successful campaign of ridding the State of obscene literature.

In August of 1953, the Attorney General of the Commonwealth was elected Vice-President and one of six members of the Executive Board of the National Association of Attorneys General, and was also named Chairman of the Eastern States Conference of Attorneys General, a territory which includes Maine, New Hampshire, Vermont, Rhode Island, Connecticut, Massachusetts, New York, New Jersey, Pennsylvania, Delaware, West Virginia, the Virgin Islands and Puerto Rico.

In October, 1953, he was appointed a member of the Committee on Narcotic Drug Control of the National Association of Attorneys General, which prepared a bill for introduction into the next session of Congress providing for the reception of narcotic drug addicts in appropriate Federal hospitals upon commitment thereto by the courts.

Altogether, more than 150 separate divisions were established in the office of the Attorney General and all were integrated as a whole. Following is a more detailed account of a few of the department's activities in solving the numerous and intricate problems which arise daily during its conduct of the Commonwealth's legal business. No attempt has been made to list the many hundreds of individual matters handled at all the desks in the department and day after day in all the courts of the Commonwealth and in the Federal courts.

Land Damage Division.

The organization and procedure installed for the trial and disposition of land damage cases continued to prove both highly efficient and economical; it greatly accelerated payment of damages to landowners and resulted in prompt termination of interest charges running against the Commonwealth.

Briefly, after conferences were held with members of the judiciary and of the legal profession, the procedure consisted in establishing a separate Land Damage Division in the Department of the Attorney General, and staffing this division with six Assistant Attorneys General whose activities are exclusively devoted to the disposition of land damage litigation. Every land damage claim was reviewed, conferences were held with attorneys for the landowners in efforts to effect settlements, and numerous pre-trial conferences were held with justices of the Superior Court in many counties, resulting in disposition of many cases by settlement. Every dollar of each settlement reached has been recorded in the public records of the Superior Court for each county.

The number of cases disposed of during the above period totaled 447. The petitioners in these cases sought damages in the amount of $7,618,-935.76. The Attorney General's office disposed of these cases either through compromise or trial in the amount of $3,925,529.61, saving the Commonwealth $3,693,406.15.

In recapitulation, for the period beginning with January 22, 1953, and ending June 30, 1954, this division disposed of 734 cases. The total amount of damages sought by the petitioners amounted to $14,696,701.76. These cases were disposed of by the Attorney General's office through trial or adjustment in the amount of $6,962,930.61, or a difference between the amount requested and the amount paid out of $7,733,771.15. The interest charges involved affecting these cases which were saved by the Commonwealth amounted to $1,138,383.29.

Criminal Division.

The Criminal Division which was established early in 1953, continued to work effectively and rapidly. I wish to reiterate that I have complete confidence in the overwhelming majority of our local law enforcement officers, but this division moved quickly whenever complaints and requests for assistance were received from interested citizens all over the Commonwealth and there appeared no disposition on the part of any officials to enforce the laws.

With the co-operation of State troopers from the Department of Public Safety, raids were conducted on establishments where it had been reported that bookmaking operations were being conducted in the cities of Lawrence and Chelsea. In the former city the office of the Attorney General prosecuted 82 cases of persons charged with conspiracy on gaming charges, and in the latter city 40 were prosecuted.

After careful investigation by this division, a .12 calibre pistol which a California manufacturer was selling here through the mails was banned in Massachusetts. A single-shot weapon called a "Kruger 98," this gun was an exact duplicate on a slightly smaller scale of a German Luger pistol; made of plastic, with a four-inch steel barrel, it shot a small pellet with sufficient force to drive it through cardboard. Most of the sales had, of course, been made to minors.

The Criminal Division also investigated and exposed two vicious "sympathy schemes" under which blind persons in Massachusetts were being callously exploited. The investigations were ordered after the department was informed that a Pennsylvania and a Chicago rug company were selling machine-made rugs here under the misrepresentation they were made by blind persons and sold for the benefit of the blind here. Actually, 80 per cent of the rugs were made on machines by sighted persons, and only 20 per cent of the rugs were tied or finished off by blind persons. During the investigation it was discovered that the Chicago company alone had sold more than $1,000,000 worth of such rugs in Massachusetts since 1931, and had been doing so illegally since 1937, when the Legislature passed a law against such operations.

Both companies stopped doing business in Massachusetts after the department threatened criminal action if they continued.

The Criminal Division also handled the cases of 377 defective delinquents seeking their release from State institutions. Of the total, 246 such persons were granted their release, 69 were recommitted, 15 were adjudged to have been properly committed and their petitions were denied, 24 are presently undergoing observation periods, and 23 cases are in the Probate Courts. These matters were all handled under legislation sponsored by me in 1953, the so-called "Fingold Law," St. 1953, c. 645. The constitutionality of this new statute was established by the case of *Dubois, Petitioner*, 331 Mass. 575.

This division also appeared for the Commonwealth in 12 habeas corpus proceedings brought by persons committed as criminally insane, and in a number of proceedings instituted by petitions for writs of mandamus and writs of error. It handled some 90 extradition cases, including requests from other States and requests by the Commonwealth of Massachusetts to other States, and, after investigation, made recommendations upon 37 pardon petitions.

Attorney General *v.* Basil W. Flynn.

Following several months of intensive investigation, the Attorney General ordered the institution of proceedings for the removal from office of District Attorney Basil Winslow Flynn, of the Plymouth District. This proceeding being of so serious a nature, I felt personally obligated to undertake the presentation to the Supreme Judicial Court of the charges and evidence against the district attorney. The basis of the charges related to certain defalcations by Mr. Flynn, and my authority for instituting the proceedings stemmed from the statutory obligation placed upon me of enforcing the proper application of charitable funds.

Certain preliminary motions consisting of a motion to dismiss, motion to decline jurisdiction and a demurrer were filed by the district attorney in answer to the charges. The Supreme Judicial Court overruled the two motions and the demurrer, and on April 12, 1954, the matter was brought to a hearing before the full bench of the Supreme Judicial Court.

The district attorney was charged with violating his fiduciary obligations to a charitable trust of which he was trustee by having purchased

various properties of the trust through straws, whereby he amassed considerable personal profit, without the knowledge of his co-trustees. In addition, he was charged with keeping for his own use certain monies paid by the trust for secretarial purposes, with having allowed a company operated by the trust to pay certain health insurance covering himself and his family, and with impeding the investigation of the Attorney General and failing to make full and frank disclosure of his administration of the trust.

The court found the above charges established by the evidence presented, and in an opinion handed down on May 28, 1954, stated that sufficient cause was shown for the removal of the respondent from the office of district attorney for the Plymouth District. See *Attorney General* v. *Flynn*, 331 Mass. 413. This case is the latest in the series of removal proceedings under G. L. c. 211, § 4, but is to be distinguished from the two best-known petitions under that statute, *Attorney General* v. *Tufts*, 239 Mass. 458, and *Attorney General* v. *Pelletier*, 240 Mass. 264, in that none of the charges against Flynn had to do with his administration of the office of district attorney. The decision will stand as a landmark in the law, holding as it does, for the first time in Massachusetts if not in the entire United States, that the public good may, in a proper case, require the removal of a *public officer* by reason of purely *private acts*.

Charitable Trusts.

For the first time in 105 years there has been an amendment to the law with reference to public charities. The duties of the Attorney General with reference thereto are stated in G. L. c. 12, § 8, to be:

"He shall enforce the due application of funds given or appropriated to public charities within the commonwealth, and prevent breaches of trust in the administration thereof."

The department investigated the public charity situation in Massachusetts and found a great need for stricter supervision of some trustees who had large sums of money to handle for the purpose they were given. It was concluded that a separate division should be set up for the purpose of further investigation and supervision of the public charities under the jurisdiction of the Attorney General. Therefore, I filed a bill in the Legislature to establish a Division of Public Charities in the Department of the Attorney General. This bill was enacted and became law on June 1, 1954. It is chapter 529 of the Acts of 1954.

Immediately upon passage of the act, steps were taken to establish this Division of Public Charities, thus fulfilling a need expressed by many former Attorneys General. The public charities within the concern of the Attorney General may be "more fully defined as a gift to be applied for the benefit of an indefinite number of persons." *Jackson* v. *Phillips*, 14 Allen 539.

The new law requires the trustee or trustees or governing board of every public charity to file a written report annually on or before June first.

"Such report shall state: the names and addresses of the trustees, or if the public charity is an organization, the name and address of the organization and the names and addresses of the members of its principal governing board and of its principal officers, and if the organization is a corporation, the statute under which it was incorporated; the aggregate value of endowment and other funds, the aggregate value of real estate, and the aggregate value of tangible personal property held and administered by the public charity for charitable, educational, benevolent, humane or philanthropic purposes or for other purposes of public charity, all as shown by the books of the public charity at the end of said fiscal year, and the aggregate income and the aggregate expenditures of the public charity for such fiscal year." The filing of reports "shall not apply to any property held for any religious purpose by any public charity, incorporated or unincorporated." There is a filing fee of three dollars for each report. The division may upon application to the courts examine books and records and investigate the administration of any public charity.

Heretofore, only copies of accounts filed in the Probate Court were required to be presented to the Department of the Attorney General. Now, all public charities, incorporated or unincorporated, are required to file reports.

A total of 1,032 matters involving public charities has been considered by the department during the past year. These matters included (1) petitions for allowance of wills containing public charitable bequests or creating public charitable trusts; (2) petitions for instructions and for construction of wills; (3) petitions for the sale of real estate; (4) petitions for amalgamation; (5) petitions for allowance of accounts of executors and trustees; (6) petitions for approval of settlements and compromises; (7) petitions for application of the doctrine of cy pres; (8) petitions for the appointment and removal of trustees; (9) miscellaneous petitions. Many of these petitions required appearances in the Supreme Judicial Court and in the Probate Court.

A greater number of matters involving public charities has been handled in the period covered by this report than ever before. Trustees who had not filed accounts in far too many years are rushing to file them now. As a result, millions of dollars in dormant funds will now be put to the use intended by the testators.

Horror Comic Books.

One of the most important problems confronting the department was that of the crime and horror comic books which were flooding the Commonwealth and doing incalculable harm to the youth of our State. The most difficult part of the problem was how to get rid of such so-called literature without establishing any form of censorship.

First, the district attorneys were called in for a conference, out of which a committee was appointed consisting of three district attorneys — George E. Thompson of Middlesex County, Stephen A. Moynahan of Hampden and Berkshire Counties, and Garrett H. Byrne of Suffolk County

— and the Attorney General. This group then met with the distributors and dealers in Greater Boston, who promised their utmost co-operation in ridding their newstands of such books. It should be pointed out that it was necessary to work with the dealers and distributors instead of the publishers, since most of such comic books are published outside the Commonwealth. All of the distributors and dealers at the meeting agreed forthwith that upon notification from any law officer, they would within 24 hours remove any objectionable book from their newsstands.

Following this agreement, it was necessary to confer with a group representing the chiefs of police of the Commonwealth, who also promised their co-operation with the plan and issued a notice to that effect to all members of the Massachusetts Police Chiefs Association. In aid of this program, the department compiled a summary of the laws pertaining to obscene literature in G. L. c. 272, §§ 28 through 28H, for distribution to all police chiefs in the Commonwealth.

This whole plan was put into effect immediately, with every prospect for success through co-operation rather than censorship. More than that the plan was given national attention when representatives of the comic book industry (except for three publishers) met in New York and appointed Judge Charles F. Murphy to administer a stiff new code of ethics to be drawn up by the industry to offset the deserved criticism that horror "comic" books lead to youthful crime. With the comic book industry agreeing voluntarily to police its own publications, again there was no taint of censorship.

Telephone Rate Case.

The New England Telephone & Telegraph Company petitioned for increase of rates of $10,225,000 to the Department of Public Utilities. The department allowed it $7,446,800. The telephone company appealed to the Supreme Judicial Court claiming the decision of the department was confiscatory and unconstitutional. It raised three major points: (1) The Rate Base. (2) Rate of Return. (3) Debt Ratio.

As to the rate base, the company raised for the first time in this Commonwealth the issue as to whether or not the Department of Public Utilities was required to use the original cost (prudent investment) theory or fair value or reproduction cost theory in arriving at a rate base. The department used the original cost theory and refused to use the fair value theory which was 52.9% higher than the original cost. The department, through the Attorney General, contended it had a right to use the original cost theory and was not required by our Constitution to use the fair value theory in arriving at a rate base. If the contention of the Telephone Company prevails it would mean an increase of about $11,000,000 to the ratepayers.

As to the rate of return, the company asked for 7.33% but in its brief changed it to 6.7%. The Department of Public Utilities allowed 6.313% which the company claims in its appeal is confiscatory and unconstitutional. If the Supreme Judicial Court upholds the department's percentage it will result in a substantial saving to the ratepayer.

As to debt ratio, the company asked for a 35%-debt 65%-equity ratio, but the department would only approve a 45%-debt 55%-equity ratio. If the Supreme Judicial Court decides that the department was correct, then this would mean a saving of about $3,000,000 to the ratepayers.

The company contended that it could not earn the rate of return allowed by the Department of Public Utilities during the foreseeable effective period. This is not a legal question but a question of arithmetic to be determined at a later date.

In this case the Attorney General represented the public at all the hearings before the Department of Public Utilities and represented the department on the appeal of the company to the Supreme Judicial Court. I am confident that the Supreme Judicial Court will decide the aforesaid questions of law in our favor.

Commission against Discrimination.

As the result of a complaint filed with the Massachusetts Commission Against Discrimination against the Pullman Company of Chicago, many informal hearings and conferences were held at which an Assistant Attorney General represented the commission. As a result of these conferences and hearings, an agreement was reached which may change the 90-year-old employment policies of the company.

Three major points agreed to by the company under the terms of conciliation were:

1. The complainant, a Negro, shall be promoted to the position of "carman helper apprentice," a position which was filled only by white employees previously. (The complainant was appointed a carman apprentice helper January 8, 1954.)

2. The company shall not discriminate against anyone seeking a position as porter or conductor solely because of his race, color, religious creed, national origin or ancestry.

3. All employing officers of the company in Massachusetts shall be notified to comply with the State's fair employment practice statutes.

Negotiations before the Massachusetts Commission Against Discrimination have been watched by other States throughout the nation which have their own fair employment practice laws and in which the Pullman Company hires men for its nationwide sleeping-car service.

Veterans' Services.

During the past fiscal year, the Department of the Attorney General handled 3,034 cases for veterans and their families, in addition to advising and assisting countless others who visited the office. It has also continued to give assistance and aid to various veterans' organizations as well as to State, county, city and town officials concerned with such problems.

At this time, I should like to express my appreciation to the American Legion and the Veterans of Foreign Wars and their Auxiliaries who joined in the drive to alert the Commonwealth to the possibility of subversive acts by the Communist Party. At our request, headquarters of those

organizations mailed to all their department commanders and auxiliary presidents summaries of all Massachusetts laws relating to Communism which had been prepared by Assistants in the department. I particularly wish to express appreciation to Coleman L. Nee, American Legion State Department Commander; Mrs. Alfred C. Hendrickson, State President of the American Legion Auxiliary; Irving L. Stackpole, Veterans of Foreign Wars State Department Commander; and Miss Blanche Williston, State President of the Veterans of Foreign Wars Auxiliary.

Rent Control.

In July, 1953, an Assistant Attorney General was appointed as counsel to the State Housing Rent Co-ordinator, Mr. Paul Goddard, and he assisted in the preparation of forms and regulations to be used by communities adopting the provisions of rent control under chapter 434 of the Acts of 1953, and assisted in the preparation and presentation of a clarifying amendment to the act in the 1954 session of the General Court. See St. 1954, c. 496.

On February 2, 1954, a taxpayers' bill of complaint was filed in the Supreme Judicial Court contesting the constitutionality of the Rent Control Law, and seeking to enjoin all payments of public monies under it. The case was argued before a single justice and later before the full court. On June 16, 1954, the court denied the petition, finding the act to be constitutional. *Russell* v. *Treasurer and Receiver General*, 331 Mass. 501.

State Contracts.

Eleven contract claims were brought against the Commonwealth under G. L. c. 258. Altogether, the claims advanced by the suits amounted to $229,841.77 and they were disposed of by trial, settlement, or after an auditor's report, for $56,139.87.

The department also represented the Commonwealth in a claim against the Fall River Line Pier, Inc., for rent under a lease dated May 17, 1948. Suit was brought in the Superior Court of Bristol County for unpaid rent in the sum of $97,500, from May 17, 1950, through May 17, 1953. Payment of the rent was withheld because of the failure of the Commonwealth to complete pier renovations under a collateral agreement which materially reduced the lessee's earning capacity at the pier. After protracted negotiations, the case was settled by payment of $57,500 on account of rent arrearages through May 17, 1954, the balance being incorporated into future payments under a revised schedule of rents over the balance of the term, the total payments for the entire term remaining unchanged. Rent payments due under the new schedule have been made when due.

Lien petitions by sub-contractors are brought under G. L. c. 30, § 39, at the rate of about three per month. They are disposed of from time to time by final decrees entered by consent, either specifying payments as agreed, or dismissing the petitions.

The suit commenced against John Bowen Co., Inc., on May 21, 1953, to recover for the Commonwealth a total of $789,712.20 paid under a con-

struction contract which the Supreme Judicial Court held to be void because not awarded in compliance with the competitive bid statute, G. L. c. 149, §§ 44A–44D, inclusive, and the cross suit brought by John Bowen Co., Inc., seeking to recover a balance of $633,247.33 alleged to be due over and above the $789,712.20 referred to above for the fair value of the work done, have progressed through preliminary stages involving pleadings and interlocutory motions relating thereto. Actual trial of the cases is now in order and is anticipated before the end of 1954.

Public Administration.

Estates of persons who die, without will or heirs, are administered by public administrators, and, after the payment of debts, escheat to the Commonwealth. G. L. c. 190, § 3 (7). The relationship of the Attorney General to such administrators derives from the statute requiring him to represent officials of the Commonwealth and from c. 194, § 4, which provides that "The state treasurer shall be made a party to a petition for administration by a public administrator, and shall be given due notice of all subsequent proceedings . . ." The Attorney General appears on behalf of the State Treasurer on the sale of real and personal property, approval of accounts and on the question of the genuineness of alleged heirs.

The 59 public administrators have paid the sum of $73,945.16 into the treasury of the Commonwealth during the period covered by this report.

Insurance and Motor Vehicles Appeal Boards.

An Assistant Attorney General was assigned to attend hearings of the Insurance Appeal Board and the Motor Vehicles Appeal Board and during the past fiscal year he attended a total of 2,252 such hearings.

Workmen's Compensation.

The following is a list of the monies expended by the Commonwealth during the last fiscal year in payment of workmen's compensation benefits to injured State employees under the provisions of G. L. c. 152, and also payments made to doctors and hospitals in the treatment of said employees:

Compensation payments, including dependency payments	$348,344 36
Doctors' bills	65,936 26
Hospital bills	55,979 70

During the period in question, there were processed in the office of the Attorney General the following:

Employer's first report of injury	4,612
Medical bills	2,500
Agreements for compensation, including agreements for dependency compensation	500
Resumption of compensation agreements	25

The latter three figures are approximate since there is no exact count made because of the considerable volume of these documents and the need for handling them expeditiously.

Further, the office of the Attorney General appeared before the Industrial Accident Board in approximately 250 cases. These cases include not only claims by injured employees of the Commonwealth, but also those cases arising under sections 65, 65N, 37 and 37A of said chapter 152.

Motor Tort Cases.

Under G. L. c. 12, § 3B, the office of the Attorney General handles all claims arising out of the operation of State-owned motor vehicles by State employees within the scope of their employment. In the last fiscal year, 179 such cases were disposed of either by settlement or trial. There were many cases with serious personal injuries wherein plaintiff's claims for damages exceeded the sums for which this department may settle cases without trial ($5,000 per person for injuries or death, and $1,000 for property damage). Such claims, of course, had to be fully tried before a court; in a number of them, the resulting finding was in favor of the Commonwealth

Communism.

On April 1, 1954, an application was made before Chief Justice Adlow of the Boston Municipal Court for a search and seizure warrant for any evidence obtained at the Communist Party Headquarters, 2 Park Square, Boston, following which, on the same date, a raid, led by an Assistant Attorney General, was effected on the said premises. A quantity of subversive and inflammatory literature was seized by virtue of said warrant.

On April 2, 1954, application for complaints against one Otis Archer Hood was made at the Boston Municipal Court before Chief Justice Adlow who, upon hearing the evidence, issued complaints against Hood alleging that he was a member of a subversive organization, to wit, the Communist Party, knowing the said organization to be subversive in violation of G. L. c. 264, § 19, and further alleging that Hood did contribute money to the Communist Party on two different occasions in violation of G. L. c. 264, § 23. He was arrested on said complaints and admitted to bail in the amount of $5,000. On the same day, Hood, without prior notice to the Attorney General, filed a bill in equity in the Suffolk Superior Court in Equity, No. 68111, for a declaratory judgment seeking to have the Anti-Communist Law declared unconstitutional and further seeking to enjoin the Attorney General from criminally prosecuting Hood for violations of chapter 264. (This matter, never heard upon its merits, was discontinued by the petitioner after the close of the fiscal year.)

The complaints issued by the Boston Municipal Court were continued and during the interim the Attorney General presented evidence before the Suffolk County Grand Jury, which returned two indictments against Otis Archer Hood on April 8, 1954, both based upon said chapter 264.

On April 9, 1954, the defendant was brought into court on a warrant and, after being allowed two weeks for filing special pleas, pleaded "not

guilty" to the said indictments. He was released on bail in the sum of $5,000 on each indictment for his appearance before the court when needed. On April 23, 1954, Hood filed motions to quash the indictments, which were argued on May 20, 1954, before Murray, J., of the Superior Court.

On June 24, 1954, Justice Murray reserved the case for report before trial to the Supreme Judicial Court, under an act passed by the Legislature in 1954 permitting such action in criminal cases. The full court has yet to pass upon this matter.

Guarantee Fire & Marine Insurance Company.

The Guarantee Fire & Marine Insurance Company, duly organized under the laws of the State of South Carolina, was never admitted to do business in Massachusetts by the Commissioner of Insurance as a foreign insurance company under the provisions of G. L. c. 175. For some time prior to November, 1953, however, it had done business through various agents in Massachusetts and issued policies on collision, property damage and extraterritorial risks.

On information received, the Insurance Department of the Commonwealth concluded that the company was about to withdraw from Massachusetts banks and depositories assets totaling $167,000, which sum represented the total premium collection from Massachusetts policyholders. Had this taken place there would have been no funds available for attachment by any claimant against the company. In the event of litigation, there was no authorized agent upon whom service of processes could be made.

Upon official receipt of a complaint from the Commissioner of Insurance, this department immediately filed a bill in equity seeking injunctions preventing this company from effecting such withdrawals.

The court granted all the injunctions requested.

Following numerous conferences with attorneys for the company and other respondents, a stipulation of settlement was entered into, providing, among other things, that any and all withdrawals by check, draft, or otherwise, of funds in the possession of the depository banks should require and bear the signature of the Commissioner of Insurance, and that no monies should be paid to the company until a determination had been made by the Commissioner that a surplus existed over and above the total of any and all outstanding claims.

This case marked a precedent in that it was the first time such a result was accomplished without receivership proceedings.

Mental Health.

The Department of the Attorney General handles cases involving collections for the Commonwealth of claims for maintenance and support of patients in the several State mental health institutions. During the period from July 1, 1953, to June 30, 1954, 30 cases were settled and the sum of $47,624.20 collected.

State Housing Board.

Three Assistant Attorneys General are assigned on a full-time basis to the service of the State Housing Board. During the past fiscal year, they have been called upon to give advice and legal assistance to said board upon a multitude of problems, including reviews of title abstracts, the organization of local housing authorities, the drafting of legislation designed to clarify and improve existing legal procedures, and the review and approval of note issues, and they have attended several hundreds of hearings concerning contract disputes and other associated controversies.

Town By-Laws.

By virtue of the provisions of G. L. c. 40, § 32, before a town by-law takes effect it must be approved by the Attorney General. In this connection, 209 town by-laws were processed by an Assistant Attorney General assigned to this work. Realizing the uncertainty and inconvenience entailed by any delay in this department in acting upon by-laws sent here for approval, it has been the department's policy to see that each by-law sent in is studied, acted upon and returned with all possible speed.

Worcester Disaster.

Immediately following the disastrous tornado which struck the Worcester area on June 9, 1953, a special branch of the Department of the Attorney General was opened in the Worcester County Courthouse Annex and four Assistant Attorneys General were sent there to assist in the solution of the various problems of the disaster victims. This office was kept open seven days a week and all advice and help given was free. Help in establishing this branch office was swiftly given by the Worcester County Commissioners, who co-operated fully up to the closing of the office on July 3, 1953. Altogether, more than 1,000 distressed persons were given free legal advice, were shown how to fill out various necessary forms, and were given assistance in locating agencies to help them with temporary relief. Persons who had some basis for litigation in court were referred to their own lawyer or to the Legal Aid Society.

This branch office also assisted many tornado victims in replacing lost U. S. Savings Bonds, by filling out forms for securing the numbers of the lost bonds from the Treasury Department. The Assistant Attorneys General assigned to this office also advised heads of State departments handling disaster relief. In many cases the Assistants prevented the tornado sufferers from being victimized by unscrupulous contractors.

Conclusion.

Again I wish to express my appreciation to His Excellency the Governor of the Commonwealth, to the Legislature, and to all the other constitutional officers of the State government for their helpful co-operation during my administration.

I also wish to express appreciation to the Assistant Attorneys General, to all others associated in the department, to the district attorneys and to the members of the police, State and municipal, upon whose fidelity, ability and co-operation depends the careful, efficient and just administration of the Department of the Attorney General.

Respectfully submitted,

GEORGE FINGOLD,
Attorney General.

OPINIONS.

Reitirement, Effective Date — Immediate Appointment to New State Office.

July 8, 1953.

His Excellency Christian A. Herter, *Governor of the Commonwealth.*

Sir: — You have informed me that you have received a request for retirement under the provisions of G. L. c. 32, § 58, as most recently amended by St. 1950, c. 688, § 3, from an official of the Commonwealth who is a veteran within the meaning of that term as defined in section 1 of said chapter 32, and who has been in the service of the Commonwealth continuously for more than thirty years. You have advised me that on March 30, 1943, this official submitted a request for retirement under the provisions of G. L. c. 32, § 58, as then in force, and that on March 31, 1943, the then Governor, as retiring authority, approved the said request for retirement. You have also advised me that following approval of said request for retirement and on the same day, the official in question was appointed commissioner of the department in which he had been serving and that he continued in that position until July 20, 1950, when he resigned and again on the same day was appointed head of a division in the executive department, which position he still holds; that since the approval of his application for retirement there has been no interruption of the official's active service or salary and that there has been no payment to him of a retirement allowance or pension.

You have asked my opinion whether, in the light of these facts, you may approve said official's present request for retirement from the active service of the Commonwealth under the provisions of G. L. c. 32, § 58, as now in force.

G. L. c. 32, § 3 (7) (*g*), as now in force, provides:

"Any person retired under the provisions of this chapter, or under corresponding provisions of earlier laws or of any other general or special law, shall receive only such benefits as are allowed or granted by the particular provisions of the law under which he is retired."

I infer from the above-quoted statutory provisions, for the purposes of this opinion only, that if the official in question was retired in 1943 under G. L. c. 32, § 58, as then in force, he may not now be retired under the provisions of that section as now in force, even if otherwise eligible.

Therefore, the basic question raised by this official's present application for retirement is whether he was retired in 1943. This question may be otherwise stated as follows: Was a person, in the active service of the Commonwealth, who was eligible for retirement under G. L. c. 32, § 58, and who applied for retirement and received the approval of the retiring authority, thereby retired from active service within the meaning of that statute notwithstanding that said person was immediately appointed to

another position in the service of the Commonwealth without interruption of his active service or salary then or to date?

At the outset I wish to observe that the files of this office indicate that certain aspects of the "retirement" status of this official were the subject of an opinion rendered by one of my predecessors on April 27, 1943. However, the request for said opinion, from the Comptroller, posited that the official had then in fact retired, so that the present question was not presented and, therefore, not considered in said opinion.

In March of 1943, when this official applied for retirement thereunder, G. L. c. 32, § 58, read as follows:

"A veteran who has been in the service of the commonwealth, or of any county, city, town or district, for a total period of thirty years, shall, at his own request, with the approval of the retiring authority, be retired from active service at one-half the regular rate of compensation paid to him at the time of retirement, and payable from the same source."

It will be noted that the wording of the statute clearly distinguishes the approval of the retiring authority and the retirement itself. It is my opinion, therefore, that the approval of the retiring authority does not itself retire the applicant.

G. L. c. 32, as amended, has never contained a definition of the term "retirement." There is, however, language in decisions of our Supreme Judicial Court which is at least explanatory of the term. "In the case at bar the petitioner became separated from the classified service by reason of his retirement," *Horrigan* v. *Mayor of Pittsfield*, 298 Mass. 492, 496–497. "Retirement is commonly a separation from the classified service," *McKenney* v. *Dobbrutz*, 315 Mass. 39, 41.

See also *Feeney* v. *Metropolitan Life Insurance Co.*, 262 Mass. 238, wherein it is stated that retirement means the act of retirement or the state of being retired, and *Lyon* v. *Commr. of Corporations*, 258 Mass. 450, 452, where it is pointed out that a retirement allowance is an allowance paid by the Commonwealth (or other employer) to one who has ceased to render active service.

It will be noted that G. L. c. 32, § 58, both in its present form and as it read in 1943, employs the phrase "retired from active service." The Supreme Judicial Court in *Kennedy* v. *Holyoke*, 312 Mass. 248, construed this phrase, as used in the similar context of G. L. c. 32, § 57, to mean that an employee must be in active service at the time of retirement. In my opinion, this phrase means also that an employee must leave active service in order to be retired. It is a truism to say that in order to be retired from active service a person must be retired from active service, *i.e.*, must be separated or withdraw from active service.

I conclude from the foregoing, as well as from the common understanding of retirement, that the substance of retirement is separation from active service and that a person who has not been separated from active service following approval of his application for retirement has not been retired.

I wish to point out that I am not here deciding that the right to retire under a statute can accrue only when the person claiming such right has actually left the active service. This is not a case where the issue is one of a right *to* retire. This is a case where the issue is whether a person who was and is entitled to retire under a given statute *has* retired, *i.e.*, whether he has done all the statute requires for establishment of retirement status.

I find support for the conclusion heretofore stated in a decision dealing with what is, in my opinion, the converse of the subject situation. In *Caswell* v. *Somerville Retirement System*, 306 Mass. 373, the basic issue before the court was whether certain police officers who had been appointed, confirmed and sworn in as such before December 27, 1930, but whose daily routine service and pay began on January 11, 1931, were in active service on January 1, 1931, within the meaning of an applicable pension law (G. L. c. 32, § 83), which provided for the retirement "from active service" of certain police officers disabled for duty. It was held that they were not. In my opinion, it follows that if a person appointed, confirmed and qualified is not in active service for retirement purposes until he begins to perform his duties, a person who has received approval of his application for retirement has not been retired from active service until he ceases performance of his duties.

Since this official has never been retired, it remains only to consider whether he is now barred from retirement on some other ground because of the submission and approval of his retirement application in 1943. Otherwise stated, must this official be denied retirement under the present law because he applied for and erroneously thought he had achieved retirement status under an earlier law? In brief, is he estopped now to claim retirement? In my opinion there is no estoppel here.

"In order to work an estoppel it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done and which has resulted to his harm and that the other knew or had reasonable cause to know that such consequence might follow." *Delaware and Hudson Co.* v. *Boston Railroad Holding Co.*, 328 Mass. 63, 80.

On the facts stated, it is apparent that the Commonwealth has not been misled to its harm. No payment of a retirement allowance or pension has ever been made. Both the Commonwealth's agents and this official may have been mistaken as to his status, but otherwise their relative positions have remained unchanged, with the Commonwealth continuing to receive the benefit of his services.

It is, therefore, my opinion that you may approve said official's present request for retirement from the service of the Commonwealth under the provisions of G. L. c. 32, § 58, as now in force.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

State Plan for Vocational Rehabilitation — Administration of Such Plan.

JULY 8, 1953.

Hon. JOHN J. DESMOND, Jr., *Executive Officer, State Board for Vocational Education.*

DEAR SIR: — You have recently asked this department for an interpretation of certain provisions of St. 1952, cc. 585 and 630, discussed below.

Since the provisions in question have to do with your official duties, and those of the board of which you are the executive officer, I am happy to comply with your requests.

1. You inquire whether the Massachusetts Rehabilitation Commission, established by section 1 of said chapter 630 (hereinafter called the commission), or the State Board for Vocational Education (hereinafter called the board) is the sole agency for the administration of the State plan for vocational rehabilitation; you point out that the provisions of Public Law 113, 78th Congress (29 U. S. C. §§ 31 ff) require that the board rather than the commission be such agency if said State plan is to be approvable thereunder.

While chapter 630 provides that the commission "shall administer the provisions of . . . Public Law 113 . . ." as to certain types of rehabilitation, it also creates the commission as *a sub-committee of the board*, which is charged by said chapter with the duty of co-operating with the Federal Security Agency, or its successors, in the administration of Public Law 113, "and to secure for the commonwealth the benefits thereof." It could not have been the legislative intent to nullify its directive to the board by having the commission's authority as to certain aspects of the program superior to that of the board; nor could the commission, which is a *sub-committee* of the board, assume to possess any powers which the board itself does not have. Accordingly, in my opinion, the functions of the commission are in every respect subordinate to the overall powers of the board, which remains as the sole agency authorized to administer, supervise and control said State plan. Both the board and the commission have assumed this to be true since the effective date of chapter 630.

2. You inquire, also, whether the primary responsibility for the direction of the administration of the State vocational rehabilitation program rests, under our laws, upon a full-time program director, as required by the governing Federal regulation. My answer to this question, after a careful analysis of G. L. c. 15, as amended by said chapters 585 and 630, is in the affirmative. I have discussed this problem at length with the Director of the Division of Vocational Rehabilitation, and am informed that, subject to the supervision and control of the board, he performs the duties of full-time administrator of said program. The commission assumes no administrative functions, acts only as an advisory group, and in no way interferes with the director's management of the State program. The director, the commission and the board have all heretofore interpreted the provisions of said chapter 15, as amended, as requiring the director to assume primary responsibility for the direction of the administration of said program; in my opinion, this interpretation of the several provisions of chapter 15, as so amended, is correct.

3. You also inquire whether the provisions of chapter 630 relative to the functions of the board are "voided" by those provisions of chapter 585 which refer to the "divisions" of vocational rehabilitation and of vocational education. I answer your question in the negative. Both chapters were enacted on the same day, and amend different sections of chapter 15. They are, under common principles of legislative interpretation, to be read so that no provision of one will conflict or be inconsistent with any provision of the other. It is clear that there was no legislative intent, in the enactment of chapter 585, to detract from the force of those provisions of section 6A of chapter 15 which existed prior to the enactment of chapter 630, and which were repeated therein, that the board should be the body to co-operate with the appropriate Federal agency (or department) to secure for the Commonwealth the benefits of Public Law 113. The amendments effected by said chapters are, in my opinion, to be interpreted as

providing that the board shall retain control over the activities of the divisions above referred to, and over those of their directors, insofar as such activities relate to the State program of vocational rehabilitation. While section 4 of chapter 15, as amended by chapter 585, provides that each of the several divisions therein listed shall be under the *general supervision* of the Commissioner of Education, it is my opinion that the board, under the provisions of section 6A of chapter 15, as amended by chapter 630, has the specific supervisory powers of the State programs which the Legislature must have intended it to assume in order to qualify the State plan for vocational rehabilitation for approval under said Public Law 113.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Massachusetts Business Development Corporation — No Filing Fee for Organization Certificate.

JULY 21, 1953.

Hon. EDWARD J. CRONIN, *Secretary of the Commonwealth.*

DEAR SIR: — You have asked the opinion of this office as to the following question:

"Should the Massachusetts Business Development Corporation, established under St. 1953, c. 671, pay a filing fee upon filing a certificate under G. L. c. 155, § 13, as provided in G. L. c. 156, § 53 or in G. L. c. 156, § 55?"

In my opinion no filing fee is required.

Chapter 671 of the Acts of 1953 sets forth no specific requirement for a filing fee. Section 2 of said chapter provides that the corporation "shall be subject to, and have the powers and privileges conferred by, the provisions of chapter one hundred and fifty-five and sections eighteen, twenty-six, twenty-seven, thirty-one, thirty-three, and thirty-four of chapter one hundred and fifty-six of the General Laws as presently enacted or hereafter amended, except so far as said provisions are inconsistent with or otherwise restricted or limited by the provisions of this act."

Chapter 155 of the General Laws makes no provision for payment of a fee. Likewise, none of sections 18, 26, 27, 31, 33 or 34 of chapter 156 of the General Laws makes provision for a filing fee. It cannot be assumed that the Legislature overlooked sections 53 and 55 of chapter 156 in providing that only sections 18, 26, 27, 31, 33 and 34 of said chapter should apply to the new corporation.

We thus find no statutory requirement for a filing fee, and none can be required without statutory authorization.

Furthermore, section 15 of chapter 671 of the Acts of 1953 provides in part as follows:

"Whenever the certificate required by section thirteen of chapter one hundred and fifty-five of the General Laws has been filed in the office of the secretary of the commonwealth, said secretary shall issue and deliver

to the incorporators a certified copy of this act under the seal of the commonwealth, and said corporation shall then be authorized to commence business, and stock thereof to the extent herein or hereafter duly authorized may from time to time be issued."

If a filing fee were required, one would expect at least to find provision therefor in this section.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By HARRIS A. REYNOLDS,
Assistant Attorney General.

Department of Public Works — Division of Waterways — Use of Capital Outlay Funds for Repairs.

JULY 22, 1953.

Mr. RODOLPHE G. BESSETTE, *Director, Division of Waterways, Department of Public Works.*

DEAR SIR: — You have recently asked this department whether Capital Outlay Funds authorized for use by St. 1952, c. 604, Item 7622–01 may be used for the purpose of making a preliminary investigation in connection with repairs at the State Pier in New Bedford, Massachusetts. The investigation would consist of an examination by a diver of a portion of a sea wall around the pier from low water line to the bottom of the wall and of observations to determine the condition of the first floor framing and the fill under the Immigration Building located at the pier.

From the information submitted by you, it appears that the contemplated work is for repairs and is not for capital improvements. For this reason the cost of such repairs may not be charged to Capital Outlay Funds.

Chapter 604 of the Acts of 1952 is entitled "An Act to provide for a special Capital Outlay program for the Commonwealth." The provisions here pertinent are as follows:

"SECTION 1. To provide for a special program of construction, reconstruction, alteration and improvement of various state institutions and properties, and for the purchase of certain property, the sums set forth in section two of this act, for the several purposes and subject to the conditions specified in said section two, are hereby made available, ...

"SECTION 2.

. . . . . .

7622–01 For the improvement, development, maintenance and protection of rivers, harbors, tidewaters and shores within the commonwealth, as authorized by section eleven of chapter ninety-one of the General Laws, . . ."

The language contained in the title of the chapter and in section 1 makes it clear that the funds available thereunder are for capital improvements. The word "maintenance" as it appears in section 2 must be interpreted in the light of the whole enactment. "Maintenance" as used herein cannot be construed as referring to the ordinary and necessary recurring repairs that must be made to the pier but refers instead to maintenance problems involving capital outlays.

In summary, it is my opinion that the repairs contemplated at the State Pier in New Bedford may not be charged to Capital Outlay Funds authorized by St. 1952, c. 604, Item 7622-01.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By JOSEPH H. ELCOCK, Jr.,
Assistant Attorney General.

Retirement Benefits under St. 1952, c. 624 — Not Available to Veteran Retired under G. L. c. 32, §§ 56–60.

AUG. 3, 1953.

Mr. CARL A. SHERIDAN, *Commissioner of Administration.*

DEAR SIR: — You have recently requested this department for an opinion under the circumstances set forth. You ask three questions as follows:

"1. Does St. 1952, c. 624, § 2, apply to veterans?

"2. Can the physician's statement be considered sufficient proof that the veteran was incapacitated in line of duty?

"3. What proof should be required that disability of a veteran was caused by accident or hazard undergone while in the performance of his duties?"

I interpret your first question to relate to veterans retiring under sections 56 to 60 of chapter 32 of the General Laws, and as interpreted its answer is in the negative, in my opinion. Since questions 2 and 3 are predicated upon an affirmative answer to 1, nothing further need be said about them.

The employee you refer to was retired in 1940 under the provisions of sections 56 to 60, inclusive, of chapter 32 of the General Laws, providing for noncontributory pensions for certain veterans under stated circumstances.

You will observe that the said sections dealing with veterans' pensions are all conditioned upon designated years of creditable service. Section 56 does not become operative, as you will see, until the veteran "has been in the said service at least ten years." Section 57 requires as a prerequisite to the veteran's pension "a total period of ten years in the aggregate." The veteran's benefits under section 58 are conditioned upon service "for a total period of thirty years in the aggregate." You will have noted, therefore, that the veteran's benefits under the sections I have referred to are all conditioned upon specified years of creditable service. Section 2 of chapter 624 of the Acts of 1952, upon which the veteran relies in the matter you refer to, should be read carefully. The benefits provided for in section 2 are not payable to all retired employees, but only, as stated in the title of the act, "*to certain former public employees.*" The benefits under section 2 are not payable to retired employees receiving retirement allowances for superannuation, nor to retired employees who are receiving ordinary disability (non-service connected) retirement allowances, but only to retired employees described in section 2 who are receiving benefits "for disability caused by accident or hazard undergone while in the performance of his duties, *regardless of years of creditable service.*" You under-

stand, of course, that accidental disability (service connected) retirement benefits under section 7 of chapter 32 are payable regardless of years of creditable service. In my opinion, it is to such and similar allowances that section 2 applies. You will note also that the same distinction appears in subsection (*a*) of section 85E of chapter 32, relative to certain non-contributory pensions to employees of certain police and fire departments.

Since the General Court in its wisdom has limited the benefits of section 2 to retired employees for accidental disability "regardless of years of creditable service," it is clear to me that those benefits do not accrue to veterans receiving pensions under the provisions of sections 56 to 60, inclusive, all of which are conditioned upon years of creditable service.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Prisoner — Date of Eligibility for Parole of Prisoner Serving Concurrent Sentences.

AUG. 6, 1953.

REUBEN L. LURIE, *Commissioner of Correction.*

DEAR SIR: — You have recently asked this department for an opinion as to the date of eligibility for parole of a prisoner now serving the following sentences in the state prison:

5–12–52	Middlesex Sup.	2½–3 yrs.		Larc. in bldg.	
8– 6–52	Suffolk "	3–4 "	Conc.	Forg. & Uttering	
"	" "	3–4 "	"	" " "	
"	" "	3–4 "	"	" " "	
"	" "	3–4 "	"	" " "	
"	" "	3–4 "	"	" " "	

You call attention to G. L. c. 127, § 133, which provides as follows:

"Parole permits may be granted by the parole board to prisoners subject to its jurisdiction at such time as the board in each case may determine; provided, that no prisoner held under sentence to the state prison shall receive a parole permit until he shall have served two thirds of his minimum sentence, *or, if he has two or more sentences to be served otherwise than concurrently, two thirds of the aggregate of the minimum terms of such several sentences.*" (Italics added.)

In view of the express condition therein contained, the underlined clause of this statute should be completely disregarded except in cases where the prisoner is serving two or more sentences "otherwise than concurrently." It is my opinion that the reference to sentences "otherwise than concurrently" is to so-called "from and after" sentences. Since, in the example given, no "from and after" sentence was imposed, the answer to your question must be drawn from the provisions of said section 133 exclusive of said underlined clause.

The prisoner to whom you refer, under the provisions of said section 133 which are now presently pertinent, may not receive a parole permit "until he shall have served two thirds of his minimum sentence." Since he is now serving *two* sentences, and since, as we must read the statute as

though the underlined clause did not exist, there is no provision for aggregating them, it must be determined which of the two sentences should be used as the measure. Certainly one of them must be, since otherwise the prisoner's eligibility for parole could never be ascertained.

Nothing in the statute would seem to justify any general rule, in cases such as this, that the sentence first in point of time should be the one to consider, any more than it should be read as requiring that the sentence last imposed should govern. Similarly, it is difficult to see how the statute can be interpreted as establishing any general rule that one sentence or another shall be used as a measure depending upon its length.

The only practical solution to the problem appears to me to be to compute the eligibility date as to each of the sentences now being served, and to consider the prisoner as eligible for parole on the latest of the dates so established. This method of approach to the problem would not seem to be unfair to any prisoner, and would clearly satisfy the proviso of the statute, the sense of which appears to me to require that parole eligibility be deferred until the prisoner has served at least two thirds of that minimum sentence which would, if served in full, keep him longest in custody.

It appears that the parole board has for many years adopted this method of computation as a matter of policy, and for this reason alone it would seem to be the course to follow, since that board has the discretionary power to grant or to withhold parole permits as it may determine.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By DANIEL J. FINN,
Assistant Attorney General.

Motor Vehicles — Suspension of Registration for Non-Payment of Excise Tax on Motor Vehicles.

AUG. 10, 1953.

Mr. RUDOLPH F. KING, *Registrar of Motor Vehicles.*

DEAR SIR: — You have asked this department whether, under the provisions of G. L. c. 60A, § 2A, as most recently amended by St. 1953, c. 339, you are "required to suspend . . . certificates of registration, and . . . prohibited from renewing or issuing any certificates of registration to . . . an owner:

"(*a*) who furnishes evidence that his estate is in bankruptcy proceedings in the Federal Court; that said excise tax is included in his schedule of liabilities; and that he has not yet been discharged in bankruptcy;

"(*b*) that said excise taxes were included in this schedule of liabilities and that he has been discharged in the bankruptcy proceedings."

Said section 2A relates to the suspension of certificates of registration of motor vehicles owned by a person who has failed to pay an excise assessed under chapter 60A, and provides that such suspension shall be effected, and that there shall be no renewal or issuance of such certificates to such person, unless he files with you evidence "that the excise, and all interest thereon and costs relative thereto, have been paid *or legally abated*" (italics added).

I assume that your inquiry results from your belief that a discharge in bankrupty releases the bankrupt from his liability for such an excise, so that the same is, in a loose sense, "abated" thereby. This is not the law: a discharge in bankruptcy does not affect debts which "are due as a tax levied by the United States, or any State, county, district or municipality." 11 U. S. C. A. § 35. Accordingly, in each of the examples given in your letter, it is clear that the evidence referred to does not indicate that the excise has either been paid or "legally abated," and the answer to each of your questions is, therefore, in the affirmative.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Criminal Procedure — Effect of "Filing" a Criminal Case.

AUG. 11, 1953.

Mr. ALBERT B. CARTER, *Commissioner, Board of Probation.*

DEAR SIR: — You have recently asked this department for an opinion relative to a "filing" of a criminal case. You ask:

"When a case is 'filed' in this Commonwealth —

"1. Is this sentence equivalent to a suspended sentence?

"2. Does such a disposition make the individual liable to further court action for a period of time equal to the maximum authorized sentence?

"3. Does such a disposition entail further court restraint?"

The answer to question one, in my opinion, is in the negative. In the first place, it becomes necessary to analyze your phrase "suspended sentence." The suspension of sentence and the suspension of execution of sentence are two different things. *Boston* v. *Santosuosso*, 307 Mass. 302, 331. The final judgment in a criminal case is the sentence. *Boston* v. *Santosuosso, supra. Commonwealth* v. *Hersey*, 324 Mass. 196, 205. *Forcier* v. *Hopkins*, 329 Mass. 668, 671. The suspension of execution of sentence ordinarily is for a fixed time and upon different terms and conditions. See sections 1 and 1A of chapter 279 of the General Laws. An order of the court placing a case on file may be an entirely different disposition of a case, although it may be a part of a process reaching toward the same result. In some cases the disposition of a case by placing it on file is in substance intended to be a final disposition of the case. When, for instance, upon stipulation that the accused pay costs, it amounts in effect to an arrangement with the accused approved by the court that it shall be a final disposition. *Commonwealth* v. *Maloney*, 145 Mass. 205, 210. VII Op. Atty. Gen. 513, 516.

Generally speaking, however, it has long been a common practice in this Commonwealth, after a verdict of guilty in a criminal case when the court is satisfied that by reason of extenuating circumstances public justice does not require an immediate sentence, to order with the consent of the defendant and upon such terms as the court in its discretion may impose that the indictment or complaint be laid on file. Such an order is

not equivalent to a final judgment by which the case is put out of court, but is a mere suspending of active proceedings in the case, and leaves it within the power of the court at any time, upon motion of either party to bring the case forward and pass any lawful order or judgment therein. *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 33, 136. *Marks* v. *Wentworth*, 199 Mass. 44. *Commonwealth* v. *Carver*, 224 Mass. 42, 43.

A reading of the applicable statutes and the decisions leads me to the conclusion that, speaking accurately and technically apart from the practical aspects of the situation, the filing of a case leaves it open to be removed from the files by the court at any time for appropriate court action, whatever appropriate action consists of in a given state of circumstances. If no sentence has been imposed, it may be imposed. If sentence has been imposed and executed, the court is without power to again impose punishment, in my opinion.

In light of the foregoing, and subject to what I have already said, my answer to question one is in the negative. As modified by what I have already written, my answer to question two is in the affirmative. Subject to the above, my answer to your question three is also in the affirmative.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By FRED W. FISHER,
Assistant Attorney General.

Compensation to State Employee — Overtime Work on Holiday.

AUG. 31, 1953.

Hon. CARL A. SHERIDAN, *Commissioner of Administration.*

DEAR SIR: — You request an opinion from this office on the following question:

An employee worked a scheduled work week from Monday to Friday, inclusive, and in addition, was required to perform a full tour of duty on Saturday, July 4, 1953. Is the employee entitled to an additional day off or a day's pay in lieu thereof under G. L. c. 30, § 24A, in addition to a day of overtime pay?

You call the attention of the Attorney General to four opinions previously received by your office from this department relative to "certain aspects of said section 24A," dated March 10, 1950, August 11, 1950, June 19, 1951 and January 16, 1952. As you point out, however, none of those opinions specifically answered the question presently raised.

The employee to whom you refer has already been "compensated for overtime work" for his services on the Saturday in question, under the provisions of G. L. c. 149, § 30A, as most recently amended by St. 1952, c. 626. That statute provides that employees subject thereto shall receive such compensation for "all service in excess of . . . forty hours in any one week," regardless of when such service is performed, so that he was clearly entitled thereto.

Section 24A of chapter 30 of the General Laws specifically provides that any State employee required to work on certain holidays (including July fourth) "shall be given an additional day off . . . or . . . an additional

day's pay." This right accrues to such an employee regardless of the number of hours he may have been required to work during the week in which such holiday falls; the measure of the right is totally different from that of his right to overtime pay. In the case put by you, the employee has been required to work on a holiday, and has therefore been brought within the provisions of said section 24A. It is immaterial that he may also qualify for benefits created by another statute.

Had the fourth of July fallen on Wednesday, and if the employee had been required to work on the holiday as well as overtime on Saturday, it is clear that he would have been entitled not only to his overtime compensation but also to the benefits provided for by section 24A. The result should not be different merely because the holiday actually fell on the overtime day. In each instance, he has worked overtime and has also worked on a holiday in a single week.

Accordingly, I answer your question in the affirmative.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Department of Public Works — Compensation for Services on Project Later Abandoned.

SEPT. 29, 1953.

Mr. RODOLPHE G. BESSETTE, *Director, Division of Waterways, Department of Public Works.*

DEAR SIR: — You have requested an opinion as to the propriety of making payment under a certain contract of an amount equal to five per cent of the estimated cost of a project, for services preparing design, plans and specifications when the project was subsequently abandoned by the Commissioners because the bids received thereon were excessive.

There is no doubt that the language of Item 1 of Art. XII of the contract contemplates ultimate completion of the project for which the plans were prepared and does not expressly provide for compensation in the event of abandonment of the project after bids were received, as happened in this case.

However, it should be noted that Art. VIII contains the following provision:

". . . or, if it shall become necessary for the Department, for reasons beyond its control, to abandon or involuntarily to defer the work under this contract, or any part thereof, before completion of the services to be rendered hereunder, the Consultant shall be entitled to just and equitable compensation for any uncompensated work satisfactorily performed prior to such time."

In addition to the design services specified in Art. II, the consultants also contract to perform supervisory services under Art. IX for which compensation is to be paid at two per cent under Item 4 of Art. XII. Since the project was abandoned after completion of the plans, but before performance of the supervisory services contemplated by the contract, for reasons beyond the control of the department, it would appear that the

provisions of Art. VIII would become applicable, and that the consultant would be entitled to "just and equitable compensation for any uncompensated work satisfactorily performed."

Whether the proposed payment in an amount equal to five per cent of the estimated cost of the project is "just and equitable compensation" is a question of fact beyond the province of this office. Should you certify to the Comptroller that in the opinion of your office the proposed payment was "just and equitable" under all the circumstances, I am of the opinion that payment of that amount would then be warranted as a payment under the express provisions of said Art. VIII.

As the proposed payment is made under Art. VIII and not under Art. XII, the provisions of Art. XII relative to the time of payment are not applicable. No time for payment being specified in Art. VIII, payment within a reasonable time is presumed.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Eminent Domain — Damages for Interference with Rights of Navigation — As Element of Damage when Land Taken.

SEPT. 30, 1953.

Hon. JOHN A. VOLPE, *Commissioner of Public Works.*

DEAR SIR: — You have requested an opinion concerning the liability of the Commonwealth for damages caused by the construction of a fixed bridge over a navigable stream. You state that a lumber company is located upstream from the location of a proposed bridge across the Neponset River and that ships which customarily proceed upstream to the wharf of the lumber company will be unable to proceed beyond the bridge after it is constructed. The proposed bridge is to be constructed without a draw.

In the foregoing circumstances the lumber company is not entitled by Massachusetts law to be compensated by the Commonwealth for damage occasioned by a bridge which cuts off its access to the sea. The injury to navigation is not an injury to a private property right of the lumber company but is instead an injury to a public right for which a private individual may not recover damages. The case of *Blackwell* v. *Old Colony R. Co.*, 122 Mass. 1, cited by you, maintains this proposition and is still good law. See IV Op. Atty. Gen. 232.

You refer also to the case of *Butchers Slaughtering &c. Assoc.* v. *Boston*, 214 Mass. 254. In that case recovery was allowed to the owner of a wharf located on the Charles River who was cut off from access to the sea by construction of a bridge without a draw, but such recovery was based upon a special statutory enactment embodied in St. 1902, c. 464.

Your attention is called to the fact that said statute was passed in order to comply with a condition imposed by the Federal government which required the Commonwealth to compensate the owners of wharf property located above the bridge.

The rights of the Commonwealth to control navigable rivers are subject to the powers of the Federal government arising out of such matters as defense and interstate commerce. For this reason the appropriate Federal officials should be contacted concerning erection of the proposed bridge in

order to avoid possible admiralty claims in the Federal courts where private individuals may sue for interference with rights of navigation. See *New York, N. H. & H. R. Co.* v. *Piscataqua Nav. Co.*, 108 Fed. 92.

You ask, secondly, concerning liability of the Commonwealth to riparian owners from whom land is actually taken. It is assumed that you make reference to the Commonwealth's liability for interference with the right of navigation and the right of access to the river enjoyed by such riparian owners. In assessing the value of the land taken, it may be shown that the land had a peculiar value because of its proximity to the navigable river. To this extent, the right of navigation and the right of access to the river may be an element of damage. *Drury* v. *Midland R. Co.*, 127 Mass. 571, 583.

Where land of a riparian owner is not taken, the Commonwealth need not compensate the riparian owner either for cutting off his land from access to a navigable river (*Home for Aged Women* v. *Commonwealth*, 202 Mass. 422, 428) or for depriving him of his right to navigate in the river (*Blackwell* v. *Old Colony R. Co.*, 122 Mass. 1).

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

State Highways — Obstruction — Overhanging Canopies.

OCT. 5, 1953.

Hon. JOHN A. VOLPE, *Commissioner of Public Works.*

DEAR SIR: — You have requested an opinion concerning the authority of your department to issue permits for the erection of canopies which will overhang State highways.

General Laws, c. 81, § 21, quoted in part in your letter, prohibits the placing of an "obstruction or structure" on a State highway without the written permit of the department. It is the opinion of this office that a canopy overhanging a State highway could constitute an "obstruction or structure" within the meaning of said section 21 and may be erected only if a permit is issued by the department.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By HARRIS A. REYNOLDS,
Assistant Attorney General.

Payroll Certification for Assistant Register of Probate.

NOV. 16, 1953.

Hon. CARL A. SHERIDAN, *Commissioner of Administration.*

DEAR SIR: — In your recent letter to me you state that "a question has arisen regarding a certification of a payroll for the assistant registers of probate in the County of Essex . . . because of (a) . . . payroll de-

duction made by the register of probate which was in direct contradiction to the decision of the judges of the court." You inquire whether "the payroll for the assistant registers and clerks can be certified by the judges of the court or whether such certification can only be made by the register of probate?"

Assistant registers of probate in Essex County are appointed, and can be removed, only by the judges of probate; they must give bonds for the faithful performance of their duties in sums to be fixed by the judges. G. L. c. 217, §§ 23, 24, 25A. While they are subject to the direction of the register in the matter of the performance of their duties (§ 27 of c. 217), I find nothing in the law giving the register control of any sort over the amount or the payment of their salaries, which are specifically set by section 35B of said chapter 217. Indeed, because section 24 expressly makes their tenure of office subject only to the pleasure of the judges who appoint them, it seems abundantly clear that their compensation is to be denied them only by the judges' action or failure to act. *Cf.* section 33 of chapter 217, which relates to employees of the register, and section 45 of chapter 30 of the General Laws, which provides for the classification of "clerical" assistants of the register. As to such personnel, the register has extensive control; as to the assistant registers, whose appointments and removals are the business only of the judges, his control is far less extensive.

The payroll including the names of assistant registers should be signed "by the person authorized to incur such obligation." G. L. c. 7, § 13. Since the provisions of c. 217, § 24, are permissive, and the judges of probate need not have appointed the assistant registers unless they saw fit to do so, they are the persons authorized to incur the expenditures represented by the salaries of such assistants; the amount of those expenditures having been fixed definitively by c. 217, § 35B, the "approval" of the payment of such salaries would seem to be almost perfunctory, and in my opinion the register has no right or power to delay such payment over the objections of the judges.

Accordingly, I advise you that the judges of probate may properly certify the payroll for the assistant registers of probate in Essex County.

Without further information as to the appointment and duties of the "clerks" mentioned in your question, I do not see that your inquiry as to them can be presently answered except as it has already been discussed in the foregoing.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

University of Massachusetts — Teaching Assignments.

NOV. 23, 1953.

Mr. J. PAUL MATHER, *Provost, University of Massachusetts.*

DEAR SIR: — You have recently asked the following question:

"Can the University or its Board of Trustees employ persons whose duties would consist of a combination of teaching and other activities such

as research work or extension work on a 12 month's basis without violation of G. L. c. 29, § 31?"

and the further question:

"Can the University or its Trustees require members of the professional staff in research or extension to do part-time classroom teaching on the campus without thereby entitling them to a claim on a shorter or academic year?"

Your letter does not contain any information indicating any tenure rights of your teachers except as provided by the "Terms of Employment" appearing on the back of your appointments. In view of the provision of section 9 of chapter 75 of the General Laws to the effect that "the trustees shall, on behalf of the commonwealth, manage and administer the university," I assume that none exist except so far as appear in your appointments and the terms of employment above referred to. I notice also that by virtue of the provisions of section 10 of chapter 75 "the trustees shall make reasonable rules and by-laws consistent with law, with reasonable penalties, for the government of the university and for the regulation of their own body."

The provision in section 31 of chapter 29 to which you refer and which, of course, forms part of any arrangement covered by section 31 is limited to "the annual salary of each teacher and each supervisor employed in any school or college within any department of the commonwealth, whose regular service is rendered from September first to June thirtieth . . ." It does not interfere with nor control, in my opinion, the salary of any teacher or supervisor whose regular service is not limited to the period mentioned. If a person is employed whose duties include in part those of a teacher and in part otherwise, whose regular service in these capacities covers the entire year, the said statutory limitation contained in this section does not control. By the same token the person employed for the twelve-month period, whose activities include some teaching as well as other duties during that period, is not controlled by the portion of section 31 above referred to.

Without attempting to control the phraseology of your appointments, it should be made clear that all such appointments as are intended to cover a twelve-month period and include teaching as well as other duties should so state.

Subject to the foregoing, in my opinion, the answers to your questions are both in the affirmative.

I am writing on the assumption that the University in this situation will take no steps to infringe upon the rights of its employees under existing arrangements not acceptable to them but will apply only to future relations mutually satisfactory.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Boston Arena Authority — Tort Liability — Liability Insurance.

Dec. 2, 1953.

Mr. Daniel McFadden, *Boston Arena Authority.*

Dear Sir: — You have asked this department for an opinion as to several questions, which are quoted below.

The answers to the questions you pose depend upon the construction of the provisions of chapter 669 of the Acts of 1953 and the status of the Boston Arena Authority created thereby. The act creates the Boston Arena Authority, which is described as "a public instrumentality"; and further states that "the exercise by the authority of the powers conferred by this act shall be deemed and held to be the performance of essential governmental functions and the *authority* shall not be liable for any injury, loss or damage suffered by any person or property by reason of any ordinary or gross negligence of the authority or any of its officers, employees or agents."

By virtue of the provisions of section 3 the Authority is empowered —

"(*c*) To sue and be sued, and to plead and be impleaded, in its own name;

"(*d*) To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;

"(*e*) To insure, maintain, repair and improve said arena and operate the same as an indoor hockey and skating rink . . . or, if there is no substantial demand for such use of said arena or part thereof, to permit the use of said arena or part thereof for commercial purposes;

. . . . . .

"(*h*) To fix from time to time and charge and collect fees for admission to, or the use or occupancy of, said arena or any part thereof, . . .

"(*i*) To make all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act, . . . and to do all acts and things necessary or convenient to carry out the powers expressly granted in this act.

"The authority shall fix such fees under clause (*h*) as in its judgment are best adapted to insure sufficient income to meet the expenses of the authority."

Section 5 provides that expenses incurred in carrying out the provisions of this act shall not constitute a debt of the Commonwealth or of any political subdivision thereof, but shall be payable solely from funds provided under authority of this act; and no expense, liability or obligation shall be incurred by the Authority under this act beyond the extent to which moneys shall have been provided under the provisions of this act. The Authority and its property are exempted from taxation.

Under section 8 an appropriation is made from the general fund or revenue of the Commonwealth to provide for the expenses of acquiring the Arena and for a capital fund to facilitate the insurance, maintenance and operation of the same, in the sum of $350,000. The act further provides that any surplus shall be distributed among the cities and towns constituting the Metropolitan Parks District.

Your first question is as follows:

"In view of section 2, relating to ordinary or gross negligence, are we authorized to provide public liability if it is the opinion of the Authority that this insurance would provide not only adequate protection, but also would allow the attorneys for our insurance firm to defend against any and all suits of this kind in court?"

In my opinion, the answer to this question is in the affirmative. While there might be serious doubts as to the constitutionality of a statute attempting to exempt a commercial corporation, association or individual from liability for its torts (see *Opinion of the Justices*, 211 Mass. 618), I am not inclined to the view that the same rule would be applied to a non-profit public body created by the General Court for the benefit of the general public.

It has long been established in this Commonwealth that governmental units, such as municipalities, are not responsible for torts arising out of the performance by them of public functions for the public benefit and from which no profit is derived. *Hill* v. *Boston*, 122 Mass. 344. *Beakey* v. *Billerica*, 324 Mass. 290.

While the status of the Arena Authority has not yet been adjudicated and may depend somewhat upon the extent of the revenue which it receives, *Baumgardner* v. *Boston*, 304 Mass. 100, in view of the fact that any surplus revenue goes back to the general public, it is my opinion that the provisions of section 2 exempting the Authority from liability for its torts are not unconstitutional.

It will be noted, however, that the exculpatory clause protects the Authority alone, no one else. The officers, employees and agents of the Authority will be liable for their torts, nevertheless. There is no provision exempting them. However, your Authority should make very certain that your public liability policies should protect and indemnify not only the Authority itself but its officers, agents and employees.

Your next question reads:

"Could the members of the Authority be held responsible for deliberate malfeasance on the part of any of its employees?"

I answer this question in the affirmative. As I have stated, there is no provision exempting anybody but the Authority itself from liability. Its members, in my opinion, can be held responsible if they would otherwise be responsible for the misdoings of its employees.

Your next question reads:

"If we cannot protect ourselves with public liability insurance within the scope of the act, there is the problem of legal counsel in defense of suits in court. Could such legal assistance be rendered by your office in such cases?"

In view of the foregoing, no reply to this question is necessary.

Your last question reads:

"Finally, is it your opinion that there would be danger of section 2 of the act pertaining to ordinary and gross negligence being declared unconstitutional?"

It is my opinion that the exculpatory clause referred to in section 2 is not unconstitutional, but the possibility of a successful challenge cannot, of course, be denied.

Finally, of course, the Authority has no power to create liabilities which at any time exceed the funds available.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Payroll Payment for Assistant Register of Probate.

DEC. 7, 1953.

Mr. FRED A. MONCEWICZ, *Comptroller.*

DEAR SIR: — In your recent letter to me you refer to an opinion which, at the request of the Commissioner of Administration, I gave to him on November 16, 1953. That opinion was, in effect, that in the event of a disagreement between the judges of probate and the register of probate in Essex County as to the propriety of a payroll item with relation to one of the assistant registers, your office should recognize the "certification" of the judges, notwithstanding your usual practice of requiring all probate payrolls to be signed by the register.

You now inquire:

1. May payments for the salaries of assistant registers of probate in a particular county be warranted for payment only after approval by the judge of the probate court concerned?

2. Does payment made from the appropriation for the salary of the register require the signature of the judge of the probate court concerned or the signature of the register?

3. Is the approval of the judge of the probate court or the register of the probate court necessary for payments to be made from the appropriation for clerical assistance to the register?

You call my attention, particularly, to the provisions of section 20 of chapter 29 of the General Laws, which are as follows:

"No account or demand requiring the certificate of the comptroller or warrant of the governor shall be paid from an appropriation unless it has been authorized and approved by the head of the department, office, commission or institution for which it was contracted; . . ."

From your letter, it is apparent that you interpret the provisions of said section to require the *signature* of "the head of the department, office, commission or institution" upon accounts or demands to be certified by you. While the authorization and approval of such a person might best be so evidenced, section 20 does not in terms make the requirement which you read into it.

The affidavit, upon probate court payrolls, of the "person authorized to incur such obligation" may be demanded by you under G. L. c. 7, § 13, but the statute which you cite does not, of itself, raise the questions which your letter poses. I take it that your practice has been to accept the signature of the register upon all probate court payrolls as evidence that the authorization and approval thereof required by said chapter 29, section 20, exists, and I see no reason why this practice should not be continued.

But it should be understood that the register's signature appears upon such payrolls solely as such evidence and not because he is "the head of the department, office, commission or institution" under section 20. If a probate court can be considered to be an "office" under said statute, as to which question I do not see that any present position need be taken, it seems clear that its head would be the judge rather than the register of probate, since the latter is, in large measures, subject to the direction, in the performance of his duties, of the former. G. L. c. 217, § 15.

With reference to your questions, then, and in accordance, also, with my said opinion of November 16, 1953, I advise you as follows:

Upon the assumption that chapter 29, section 20, has application to probate court payrolls, it would be proper for you, as long as the judges of probate and the register find themselves in accord as to all items thereon, to continue to assume that the signature or "certification" of the latter upon such payrolls is evidence that they have been authorized and approved as required by said section. When a disagreement exists between the judge or judges and the register as to a payroll item concerning an assistant register, I refer you to my opinion of November 16, 1953 for your answer. I am not aware that any actual problem now exists which calls for any ruling from me as to the effect of a controversy between a judge and a register as to the propriety of a payroll item concerning any other probate employee.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Department of Public Works — Highway Fund — Use of Bond Issue Proceeds for Maintenance Shop.

DEC. 9, 1953.

Hon. JOHN A. VOLPE, *Commissioner of Public Works.*

DEAR SIR: — In your recent letter, you requested my opinion as to whether the provisions of the 1952 Bond Issue Act, chapter 556, authorize the construction of a maintenance shop with funds provided under said act in connection with the maintenance and operation of the John F. Fitzgerald Expressway, or the Boston Central Artery, so called.

This highway, as set forth in your letter, is now being constructed with funds obtained under the 1952 Bond Issue Act and the two prior Bond Issue Acts.

In the formulation of the opinion herein expressed the following legislative and constitutional provisions were analyzed and reviewed:

Chapter 556 of the Acts of 1952 entitled "An Act providing for an accelerated highway program," sometimes known as the Third Bond Issue Act.

Section 4 of Mass. Const. Amend. LXII.

Chapter 92A of the General Laws authorizing the establishment of the Massachusetts Public Building Commission.

A careful examination of chapter 556 of the Acts of 1952 and the prior Bond Issue Acts discloses that the sections pertinent to the opinion sought by your letter are sections 1 and 9 of the 1952 act. Section 9 of chapter 556 reads as follows:

"The cost of the work authorized in section one shall include all project payments, property damages, expenses for consultants and engineering services, including traffic studies, and for all legal and other technical and expert services, and incidental expenses in connection with the projects herein authorized. . . ."

Thus does section 9 refer to and incorporate therein the description of projects set forth in section 1.

Section 1 lists the projects as follows:

". . . for the laying out, construction, reconstruction, resurfacing and relocation of highways, parkways, bridges, grade crossing eliminations and alterations of crossings . . ."

The language of section 1 defines the projects, and in so doing limits the incidental expenses authorized in section 9, since those incidental expenses must arise "in connection with the projects authorized" in section 1. A careful examination and analysis of sections 1 and 9 of chapter 556 lends no support to the contention that maintenance, repair and the construction of maintenance and repair shops are incidental expenses in connection with the projects authorized in section 1. The absence of the words "maintain" or "repair" in the legislation under discussion is a vital omission and renders illegal any expenditure of the funds obtained from the sale of bonds pursuant to this legislation for such purpose as the construction of maintenance and repair shops. Therefore, in line with well-established principles of statutory interpretation, the absence of the words "maintain" or "repair," the specific definition of authorized projects in section 1 and the limitation of incidental expenses by the language of section 9 of chapter 556 justify no other conclusion but that the language of chapter 556 does not authorize the expenditure of funds provided under that chapter for construction of a maintenance shop to house equipment and supplies and to furnish working space for the maintenance and operation of the John F. Fitzgerald Expressway or Boston Central Artery.

Further support for this conclusion is to be found in the constitutional prohibition that money borrowed by the Commonwealth shall not be expended for any other purpose than that for which it was borrowed. This restriction is set forth in section 4 of Mass. Const. Amend. LXII as follows:

"Borrowed money shall not be expended for any other purpose than that for which it was borrowed or for the reduction or discharge of the principal of the loan."

Your attention is further directed to the various sections of chapter 92A. A review of this statute demonstrates that the project of constructing such a shop as that referred to in your letter is one which requires the approval of the Massachusetts Public Building Commission.

In accord with the foregoing, I am of the opinion that the answer to your question as to whether chapter 556 authorizes the construction of the project referred to in your letter must be in the negative.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Public Contracts — Error in Borings — Reliance thereon by Contractor.

Dec. 14, 1953.

Hon. Charles W. Greenough, *Commissioner, Metropolitan District Commission.*

Dear Sir: — You have written to this office asking whether the Metropolitan District Commission or the Cabot Construction Corporation is responsible for certain additional expenses to be incurred in connection with the construction of the Framingham Trunk Interceptor sewer under Contract No. 135.

The pertinent facts appear to be as follows: The Cabot Construction Company has entered into a contract with the Commission for the construction of approximately 8,000 feet of sewer in Framingham. During the course of construction, the contractor has encountered a section of approximately 1,800 feet where the sewer must be tunnelled through sandy soil highly inundated with water, requiring compressed air operations at an increased cost of about $275,000. The total contract price without this additional item is about $1,000,000.

The contractor asserts that it relied on test borings made at the site before award of the contract, which borings indicated that the tunnel would pass through rock at the area in question. From this information, the contractor concluded that the use of compressed air would not be necessary. The borings were made by a firm employed by the Commonwealth and were examined by the contractor before it submitted a bid on the contract. Subsequent borings made after the award of the contract indicate that the original borings were in error. Neither the Commission nor the contractor knew of the error at the time the contract was executed.

The contract incorporates within it the terms of a document entitled "Information for Bidders" which contains the following express language:

"Bidders are required to submit their proposals upon the following express conditions, which shall apply to and become part of every bid received, viz.:

" 'Bidders must satisfy themselves by personal examination of the location of the proposed work and by such other means as they may desire, as to actual conditions and requirements of the work, and the accuracy of the quantities assumed by the Engineer.'

"All information given on the drawings, or in the contract documents, relating to borings and materials encountered, groundwater, subsurface conditions, and existing pipes and other structures is from the best sources at present available to the Commission. All such information and the drawings of existing construction are furnished only for the information and convenience of bidders.

"It is understood and agreed that the Commission does not warrant or guarantee that the materials, conditions, and pipes or other structures encountered during construction will be the same as those indicated by the boring samples or by the information given on the drawings. The bidder must satisfy himself regarding the character, quantitities, and conditions of the various materials and the work to be done.

"It is further understood and agreed that the bidder or the Contractor

will not use any of the information made available to him, or obtained in any examination made by him, in any manner as a basis or ground of claim or demand of any nature against the Commission or the Engineer, arising from or by reason of any variance which may exist between the information offered and the actual materials or structures encountered during the construction work."

Article XVII (page 30) of the contract states in part as follows:

"The Contractor agrees that he has entered into this agreement upon his own examination of the location of the proposed work and the character of the work required, and not upon any statements made or plans furnished by the Commission or any officer, employee or agent thereof."

Subsequent to the receipt of your original letter, there have been several conferences concerning the foregoing problem which have brought out the additional fact that the contractor initially attempted to construct the tunnel through the sandy soil without using compressed air. The operation caused an excessive loss of earth and material in the vicinity of the tunnelling, resulting in settlement of the ground above the tunnelling and damage to homes and buildings standing on such ground.

As a result of these conferences, you have asked, first, whether the Commission has authority to issue a change order to cover the increased cost of compressed air operation and, second, whether the Commission may reduce the scope of the work so as to eliminate from the contract the 1,800-foot section in question in accordance with Article XVII of the contract which provides as follows:

"The Commission reserves the right to increase or decrease the amount of any class or portion of the work as may be deemed necessary or expedient by the Commission, and an increase or decrease in the quantity for any item shall not be regarded as a sufficient ground for an increase or decrease in the prices nor in the time allowed for the completion of the work except as provided in the contract."

It is the opinion of this office that the Commission does not have authority under the contract to issue a change order to cover the increased cost of compressed air operations. Such change, increasing the obligation of the Commonwealth from $1,000,000 to $1,275,000, would be a substantial change requiring the award of a new contract under the terms of G. L. c. 29, § 8A, providing for competitive bidding on State contracts. See *Morse* v. *Boston*, 253 Mass. 247; *Morse* v. *Boston*, 260 Mass. 255.

The express terms in the contract to the effect that the contractor relied upon its own examination of the site prevent the contractor, in the absence of bad faith, from avoiding the contract on the ground that he relied on inaccurate borings made available by the Commission. *Kennedy* v. *Boston*, 286 Mass. 148; *Cavanagh* v. *Tyson, Weare & Marshall Co.*, 227 Mass. 437.

The Commission, on the other hand, does have authority under Article XVII quoted above to decrease the quantity of work to be performed where it becomes "necessary or expedient." The facts indicate that tunnelling in the sandy soil inundated with water causes an excessive loss of material with an ensuing risk to life and property caused by settlement or cave-in.

Under these circumstances, the Commission would be justified in determining that it was "necessary or expedient" to decrease the quantity of

work to be performed and could thereby eliminate from the present contract the 1,800 feet in question.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

Civil Defense Act — Re-employment of Teachers.

DEC. 18, 1953.

Hon. JOHN J. DESMOND, JR., *Commissioner of Education.*

DEAR SIR: — In your recent letter you ask two questions as follows:

"(1) Is a retired public school teacher or superintendent who was not employed under the provisions of G. L. c. 31 eligible to be re-employed under the provisions of St. 1950, c. 639, § 9 and

"(2) If such persons (public school teachers and superintendents) are eligible to re-employment, must their re-employment be by the same school committee, board, etc., or are they eligible to re-employment by any other school committee or board in the Commonwealth?"

In construing chapter 639 of the Acts of 1950 it must be borne in mind that its primary purpose is to provide flexibility in meeting a statewide emergency. The title to the act indicates as much when it is described as "An Act to provide for the safety of the Commonwealth during the existence of an *emergency* resulting from disaster or from hostile action." Section 9, which you ask me to construe, provides:

"Notwithstanding the provisions of chapter thirty-one of the General Laws, or any other provision of law affecting civil service, and the rules made thereunder on and after the declaration of a state of emergency, the director of civil service, supported by a majority vote of the civil service commission may: —

. . . . . .

"(*h*) Shall approve in writing the temporary re-employment of any former officer or employee of the commonwealth or of any political subdivision thereof who has been retired under any retirement or pension law, or who has been separated from the public service by reason of superannuation or disability without a retirement allowance or pension to any position or employment subject to chapter thirty-one of the General Laws. Any person so employed shall receive full compensation for such services less any retirement allowance or pension received by him. The written approval of the appointing officer, board or committee shall be required in the re-employment of such former officers or employees to any office or employment not subject to said chapter thirty-one.

"Any appointment or transfer made under this section shall be effective only for the period during which this section is to be operative."

Subdivision (*h*) of section 9 should, of course, be read and interpreted in the light of the over-all purpose of chapter 639. This is to provide for a marshaling of the manpower of the Commonwealth to cope with the overwhelming disaster. It should be unnecessary to deny that a portion

only of the available manpower should be made use of. Unlimited disaster should not be met with limited or partial resources. There seems to be no sensible reason why retired civil service employees should be utilized as distinguished from retired non-civil service employees.

With this in mind it will be noted that under subdivision (*h*) "*any*" former officer or employee of the Commonwealth or of "*any*" political subdivision thereof who has been retired may be re-employed in any position or employment subject to chapter 31 of the General Laws, under the conditions set forth in section 9, with the approval in writing of the Director of Civil Service supported by a majority vote of the Civil Service Commission. The word "any" in this act should, in my opinion, be construed as meaning "each."

The Legislature having provided for re-employment in civil service positions, with the approval of the Director, in the last sentence of subdivision (*h*) turns its attention to the re-employment of retired employees in non-civil service positions. Obviously, no reason exists why the Civil Service Commission or the Director should be brought into the subject of re-employment in non-civil service positions. Accordingly, the General Court provided that the re-employment in non-civil service positions should require the written approval of the appointing officer, board or committee.

Such an interpretation of subdivision (*h*) is in conformity with, and would tend to effectuate, the purpose of chapter 639. It can hardly be said that the General Court intended in section 9 to deal with an emergency piecemeal. Every reason which would justify the re-employment of former civil service employees would apply to the re-employment of former non-civil service personnel. It does not seem reasonable to assume that the General Court intended that a portion only of the public service should be alerted and made available in the emergency which the legislation attempts to deal with.

Accordingly, I answer your question No. 1 in the affirmative. This, I think, deals with the specific situation referred to in your communication.

As to your question No. 2, I am constrained to advise you that the long-continued practice of this department and the precedents set by the previous Attorneys General indicate what is undoubtedly the correct rule of law, that it is not within the province of the Attorney General to determine hypothetical questions which may arise, as distinguished from questions relative to actual states of fact set before the Attorney General, upon which states of fact public officials are presently required to act: nor is it the duty of the Attorney General to attempt to make general interpretations of statutes or of the duties of the officials thereunder except as such interpretations may be necessary to guide them in the performance of some immediate duty. See I Op. Atty. Gen. 275; II *ibid.* 100; III *ibid.* 425.

The members of this department are always at your service for consultation and assistance with reference to your work, but for the foregoing reasons I may not properly answer your question No. 2.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

State Personnel Appeal Board — Appeal on Salary Question.

JAN. 6, 1954.

Mr. GEORGE W. MARQUIS, *Permanent Chairman of Personnel Appeal Board.*

DEAR SIR: — In your recent letter you ask the following questions:

1. Assuming that an employee has exhausted all his other remedies, has he any appeal to the Personnel Appeal Board set up under G. L. c. 30, §§ 53 to 57, inclusive, on matters relating to salary?

2. If the Permanent Chairman of the Personnel Appeal Board has refused to entertain such an appeal on grounds of lack of jurisdiction, can such employee insist that said chairman convene the entire board to pass upon the board's jurisdiction?

Section 53 of chapter 30 of the General Laws provides for the "disposition of any grievance of any employee of the commonwealth . . . relating to classification, hours of employment, vacations, sick leave or other forms of leaves of absence and overtime, by appeal to a personnel appeal board . . . ." No provision is made thereby for any such appeal for the purpose of reviewing the establishment of a salary fixed under the provisions of section 46 of said chapter, and therefore, in my opinion, your first question must be answered in the negative.

Section 56 of said chapter 30 provides that if "the permanent chairman is of opinion that an appeal shall not be considered by such an appeal board . . . for any . . . reason, he shall state his opinion with the reasons therefor to the petitioner, and, if the petitioner still insists on his appeal . . . (a personnel appeal) board shall be constituted . . . and the question of whether such appeal should be considered shall be submitted to said board and it shall render a written decision on said question." Your second question is definitively answered by this provision. Of course, no decision by such a board could have the effect of enlarging its own statutory jurisdiction.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Workmen's Compensation — Waiver by Veteran — Non-Service Connected Disability.

JAN. 20, 1954.

Mr. EDWARD P. DOYLE, *Secretary, Division of Industrial Accidents.*

DEAR SIR: — You have recently asked this department for an opinion regarding a waiver by a veteran of certain rights under G. L. c. 152.

You state that the employee in question applied to the Division of Industrial Accidents, under G. L. c. 152, § 46, for approval of her waiver of certain rights to compensation. Since she is a disabled veteran you dis-

approved her application for a waiver. It appears from your letter that her service connected disability is thrombophlebitis of the left leg, which gives her a rating of twenty per cent disability, but that she is also suffering from arachnoiditis, and she desires to give a waiver as to this latter condition, which is not service connected.

You ask two questions as follows:

(1) Does G. L. c. 152, § 46, as amended by St. 1945, c. 623, involve only an application for a waiver on account of a service connected disability for which the applicant is certified by the Veterans Administration?

(2) Does the exception referred to in this statute apply to an application by any veteran certified by the Veterans Administration as disabled, irrespective of whether his condition is service connected or non-service connected?

The provision in G. L c. 152, § 46, forbidding a waiver by an employee of his rights to workmen's compensation, with an addition made in 1927 that an employee could agree to such a waiver if the waiver were approved by the Division of Industrial Accidents, was again amended by St. 1945, c. 623, which provided that "a person who is a war veteran and disabled as a result of his military or naval service and has been certified as such by the United States Veterans Administration" could not make such a waiver of future rights nor have such a waiver approved by your division.

This exception, added in 1945, is applicable to persons who fulfill *all* of the several requirements of this added provision. In the present case, if the employee technically comes within all of the descriptions and conditions of this 1945 amendment, your division would have no right to approve any waiver by her. Furthermore, this exception is not conditioned as to whether the waiver of future compensation relates to a "peculiar susceptibility to injury" which exists because of a previous injury received in military service or whether such "susceptibility" exists because of a non-service connected ailment. Your division has no right to read such a condition into this legislative act.

The 1945 amendment was included in a chapter which was designed "to encourage the rehabilitation and employment of injured war veterans." This particular amendment, very clearly, was designed to prevent a veteran from waiving compensation rights to which he might become entitled. It was this protection to veterans which the Legislature had in mind. You suggest that the inability of your division to approve a waiver for a veteran who comes within this amendment, so far as the waiver relates to non-service connected conditions, may be harmful to veterans rather than beneficial to veterans. It must be presumed that the Legislature considered all of these matters and intentionally adopted the method of protection which is specifically set forth in the 1945 amendment.

For the above reasons your first question must be answered in the negative, and your second question, so far as it relates to a veteran who is technically within the description of this amendment, must be answered in the affirmative.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Metropolitan State Hospital — Authority to Use Facsimile Signature — Indemnity Agreement for Misuse of Such Signature.

JAN. 27, 1954.

Mr. CLAUD J. N. WEBER, *Chairman, Board of Trustees, Metropolitan State Hospital.*

DEAR SIR: — In your recent letter you inquire as to the use of a facsimile signature by the treasurer of the Metropolitan State Hospital, and a requested vote of the board of trustees authorizing such signature. Such a signature would be valid. A facsimile signature, if authorized, is as much a binding and a legal signature as any other kind of a signature. There is no doubt as to the legality of such a facsimile signature. The matter has been covered in decisions by our courts and in previous decisions by the Attorney General.

You also inquire as to the legal right of your board of trustees to bind the Commonwealth by an indemnity agreement against misuse of this facsimile signature. You refer to the form of agreement submitted to you under which the Metropolitan State Hospital would indemnify and hold harmless the Harvard Trust Company against loss of any kind "arising out of the misuse or unlawful or unauthorized use by any person of such facsimile signature." I do not believe that your board has authority to make such an indemnity agreement. Certainly you have no specific authority under any statute or regulation. I do not see how such authority can be implied. All officers and agents of the Commonwealth have restricted authority, not general authority. It may be that the Harvard Trust Company would not consent to your use of a facsimile signature without this indemnity, but that situation would not, in my opinion, give you any implied authority to sign this indemnity contract. It is conceivable that such an agreement could result in substantial harm to the Metropolitan State Hospital or to the Commonwealth. Under the circumstances, it is my opinion that your board has no authority to sign the indemnity agreement set forth in the copy attached to your letter.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Commercial Use Shellfish Permit — Regulation Limiting Permit to Local Inhabitants — Power of Director of Division of Marine Fisheries.

FEB. 19, 1954.

Hon. ARTHUR T. LYMAN, *Commissioner of Natural Resources.*

DEAR SIR: — You have recently asked this department for an opinion regarding the matter of approval of an ordinance of the city of Boston relating to "Commercial Use Shellfish Permits." I note that your inquiry is made in connection with the last paragraph of G. L. c. 130, § 52; and

I understand from our recent conference that the ordinance in question relates to "areas declared . . . to be contaminated." This answer is limited to such a situation.

Your first question is as follows:

"What is the scope of the authority of the Director of the Division of Marine Fisheries under the last paragraph of section 52 of G. L. c. 130, as amended by St. 1941, c. 598, in relation to approval or disapproval of regulations?"

The authority of the Director under the last paragraph of G. L. c. 130, § 52, as amended, is restricted to instances in which the officers of a city or town seek to exercise authority under this section 52 "in areas declared . . . to be contaminated." Under said circumstances the Director has the right and duty to approve or to refuse to approve such exercise of authority by such officers. This paragraph relates solely to contaminated areas. The power given to the Director is not limited by express provisions contained in the statute itself. However, this authority must be exercised in a reasonable way, and in a manner which will carry out the purposes of the Legislature in setting up the Department of Natural Resources and the Division of Marine Fisheries and in enacting this chapter and section and amendments thereto. Consideration must be given to the provisions of St. 1953, c. 631, which set forth the most recent legislative purposes in this field.

In approving or refusing to approve regulations adopted by local authorities in areas declared to be contaminated consideration should also be given, among other matters, to the following items:

1. The purpose of the Legislature that precautions should be taken against the use of shellfish from a contaminated area which may be "unfit for food and dangerous to public health." (G. L. c. 130, § 74.)

2. The purpose of the Legislature to give control of shellfisheries to the local authorities. (G. L. c. 130, title to secs. 52–56.)

3. Is the ordinance within the scope of the statutory authorizations, and not contrary to any specific statutes? (For an example of matters of this kind see Attorney General's Report, 1944–45, pp. 43–46.)

4. Furthermore, considerations such as are mentioned above should be weighed against the background of the purpose of the Legislature to protect shellfish as a food for private consumption and as a valuable economic resource of the Commonwealth (*Commonwealth* v. *Bragg*, 328 Mass. 327, 331); and the fact that the department has been set up for the "protection, conservation, control, use, increase and development" of natural resources (G. L. c. 21, § 1, as amended by St. 1953, c. 631); and that the division has been set up to further the "biological development of marine fish and fisheries" (*id.*, § 5).

Your first question is so broad that no inclusive answer can be given. I have mentioned some considerations which should be kept in mind in approving or in refusing to approve an ordinance presented to you. But this general answer cannot be applied to any specific set of facts which may be presented to you without further study and consideration on your part.

Your second question is as follows:

"Would the Director of the Division of Marine Fisheries be justified in approving a local regulation concerning commercial use shellfish permits

which expressly provide in substance that such a permit shall not be issued to any person not an inhabitant of the city or town for at least one year next preceding making application?"

Justification for approval of such a local regulation would be conditioned on many matters not included in this question. See answer above to your first question. However, refusal to approve such a regulation *solely* on the ground that "such a permit shall not be issued to any person not an inhabitant of the city or town for at least one year next preceding making application" would not be justified. Such a restriction as to commercial shellfish permits, considered by itself, is neither unreasonable nor unconstitutional. In *Commonwealth* v. *Hilton*, 174 Mass. 29, 32, under an earlier version of the present section 52, a restriction of permits to residents of the town of Salisbury was held not to be "unconstitutional or otherwise invalid." Nor does the specific requirement that an inhabitant must be such "for at least one year next preceding making application" justify refusal to approve. Such a matter would be a consideration within the control of the local authorities. There are many precedents for such a delay in granting privileges to residents. For two examples, see sections 38 and 57 of this same chapter 130.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Department of Public Works — Highway Funds — Bond Issue Proceeds — Use of for Parking Facilities.

MARCH 3, 1954.

Hon. JOHN A. VOLPE, *Commissioner of Public Works.*

DEAR SIR: — Your letter of December 9th asks whether your department may spend highway or bond issue funds to provide parking facilities in the downtown area of Provincetown in order to accommodate the increased traffic anticipated on completion of the Mid-Cape Highway.

On December 9th, the same day on which your letter is dated, the Attorney General forwarded to you an opinion stating that your department did not have authority to use bond issue funds for the construction of a highway maintenance shop. It is the opinion of this office that the principles involved in that opinion are controlling in the present case. For the reasons there stated, bond issue funds may not be used to provide such parking spaces.

It is our conclusion also that the highway fund may not be used to construct off-street parking facilities of the kind described.

General Laws, c. 90, § 34 lists the purposes for which the fund may be used. The pertinent provisions of that section are as follows:

"(2) The balance then remaining shall be used —

"(*a*) For expenditure, under the direction of said department, for maintaining, repairing, improving and constructing town and county highways together with any money which any town or county may appropriate for

said purpose to be used on the same highways. The said ways shall remain town or county ways. In this subdivision the word 'town' shall include city;

"(*b*) For expenditure, under the direction of said department, for maintaining, repairing and improving state highways and bridges;

"(*c*) For expenditure, under the direction of said department, in addition to federal aid payments received under section thirty of chapter eighty-one, for construction of state highways;

"(*d*) For expenditure, under the direction of said department, for engineering services and expenses, for care, repair, storage, replacement and purchase of road building machinery and tools, for snow removal, for the erection and maintenance of direction signs and warning signs and for the care of shrubs and trees on state highways, and for expenses incidental to the foregoing or incidental to the purposes specified in subdivisions (*a*), (*b*) or (*c*) of this clause;"

The foregoing enactment by the General Court, with the limitations thereon, has been passed in the light of Mass. Const. Amend. LXXVIII, which limits the purposes for which such revenues may be expended.

Construction of off-street parking areas appears to involve facilities which are in addition to, rather than a part of, a highway. An expenditure for such parking areas, therefore, would not appear to be justified by the language of subdivisions (*a*), (*b*) or (*c*) as "maintaining, repairing, improving or constructing" highways. Likewise such an expenditure would not be authorized by subdivision (*d*) as "incidental to the purposes specified in subdivisions (*a*), (*b*) or (*c*) . . ."

In conclusion, it is our opinion that neither highway nor bond issue funds may be spent for construction of the proposed parking areas.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

BY JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

Eminent Domain — Damages — Tax Apportionment on Land Taken.

MARCH 11, 1954.

Mr. H. GORDON GRAY, *Acting Commissioner of Public Works.*

DEAR SIR: — You have recently asked this department for an opinion interpreting the effect of chapter 634 of the Acts of 1953 entitled "An Act relative to the apportionment of real estate taxes on land taken by eminent domain."

The act, approved July 2, 1953, reads as follows:

"*Section 1.* Section 12 of chapter 79 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding at the end the following sentence: — Whenever the title or interest taken is such that the property will be exempt from taxation so long as it is held and used for the purposes for which it is taken, the damages for the taking shall include an amount separately determined and stated which shall be estimated to be equal to that portion of the tax assessed upon the property in the year it is taken which, if the tax were apportioned pro rata accord-

ing to the number of days in such year, would be allocable to the days ensuing after the taking.

"*Section 2.* This act shall apply to all cases coming within its terms where damages are fixed after the effective date of this act notwithstanding that the taking may have been made prior to said date."

Section 12 of chapter 79 of the General Laws relates to "Measure of Damages" for property taken under this chapter.

It was obviously the Legislature's intention to add a new element of damage to be taken into consideration in the disposition of land damage claims arising under this chapter. "That portion of the tax . . . apportioned pro rata . . . allocable to the days ensuing" in the year of the taking, is to be separately determined and stated.

Your specific questions as to the procedure which should be followed in carrying out the provisions of this act and my answers thereto are as follows:

1. *In cases of partial takings, is the tax to be figured solely on the land which is taken and the structures which are located on the part taken?*

In my opinion, the specific language of the enactment requires an affirmative answer to this question.

The act applies to property exempt from taxation so long as it is held and used for the purposes for which it is taken. After a taking, the legal title to the property taken is in the Commonwealth, and is exempted from taxation. (See G. L. c. 59, § 5.) The remaining property is not so exempted and does not come within the provisions of the act. See *Lancy* v. *Boston*, 186 Mass. 128, 132.

2. *Are the taxes to be apportioned on all takings in which the Board of Commissioners accepted offers of settlement since October 1, 1953?*

Section 39 of chapter 79 provides in part that "the body politic . . . liable for such damages may after the right to such damages has become *vested* effect such settlement of the damages with the person entitled thereto as it may deem to be for *its* best interests," and provision is made enabling the "body politic . . . after the right to such damages has become *vested*" to "offer in writing to pay . . . the amount which it is willing to pay in settlement thereof, with interest thereon, together with taxable costs if a petition for the assessment of such damages is pending. . . . Acceptance thereof may be either in full satisfaction of all damages so sustained, or as a payment pro tanto without prejudice to any right to have the remainder thereof assessed by the appropriate tribunal."

Section 3, chapter 79, states:

". . . the right to damages shall not vest until such way, drain or ditch has been entered upon or possession thereof has been taken . . . and if such entry is not made or possession taken within two years of the date of the order, the taking shall be void."

Section 12 of chapter 79, which chapter 634 of the Acts of 1953 amends, relates to "Measure of Damages." And by that amendment tax allocation or apportionment is made a new element of damage to be "separately determined and stated."

The act is applicable to all takings under chapter 79 though the taking was made prior to the effective date of chapter 634. The taxes to be

allocated are to be apportioned from the date the order of taking is recorded not the date of entry.

I presume that all offers made by the Board of Commissioners acting under the authority of section 39, chapter 79, contemplated every rightful element of damage and that the same was true as to offers to settle made by landowners and accepted by the Board of Commissioners.

The offers, after acceptance, express the willingness on the part of one to pay and the other to accept, in settlement of all damages, the amount agreed upon.

The sense of your inquiry, as I understand it, is whether you are to add the amount of taxes apportioned to offers of settlement accepted since October 1, 1953, and already paid or in the process of payment.

When the Legislature gave to your department power to take land by eminent domain "under chapter seventy-nine" it intended to give to the department full and complete power to carry the necessary proceedings through to a *final termination*, with all the incidents and alternatives set forth in chapter 79. *Willar* v. *Commonwealth*, 297 Mass. 527, 529.

A payment of an offer duly made and accepted under section 39, chapter 79, is a binding termination of the proceedings.

There ought not to be any review of cases so disposed of before October 1, 1953. It is important, however, for the department to separately determine and state the amount of the taxes apportioned within the meaning of chapter 634 in all offers of settlement made under section 39.

Therefore, as to actions terminated, the answer must be in the negative, and as to pending offers of settlement the same should be reviewed so as to contain a determination and statement of the amount included in accordance with chapter 634.

3. *Does the act include payment of taxes for land takings to furnish material for the construction of public ways; land takings for providing abutting service facilities for gas stations, etc., and land takings for maintenance sites?*

The act applies to all takings made under chapter 79 of the General Laws and the answer so qualified is in the affirmative.

4. *Does the act apply in easement takings in behalf of owners whose rights of access have been taken?*

I answer this question in the affirmative.

The statute applies whenever the title or interest taken is such that the property will be exempt from taxation so long as it is held and used for the purposes for which it was taken.

Though not specifically exempted by statute (c. 59, § 5), property devoted to the public use is not taxed because it is believed by the courts that the Legislature did not intend to subject it to taxation.

When the easement taken is substantially exclusive and leaves the owner of the fee no rights of any real value, the land itself is exempt from taxation. *Lancy* v. *Boston*, 186 Mass. 128. Nichols, Taxation in Massachusetts, 3rd ed., p. 260. Cf., *Hunt* v. *Boston*, 183 Mass. 303.

5. *Is the apportionment of taxes to be paid in all cases where a jury verdict has been rendered and the date of judgment is subsequent to October 1, 1953?*

You are to assume that every element of damage, including the tax apportionment, was duly presented during the trial of the case. The practice in dealing with this phase of damages may vary considerably. The

burden of proof still remains with the petitioner. Tax apportionment is solely another element of damage. The jury's verdict is to be presumed to include all damages to which the petitioner is entitled even though in a given case the tax allocation is not separately stated. A negative answer to the question is required.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By VINCENT J. CELIA,
Assistant Attorney General.

Public Building Construction — Form of Bid Security — Bank Treasurer's Check not Acceptable.

MARCH 19, 1954.

Mr. HALL NICHOLS, *Director of Building Construction.*

DEAR SIR: — You have recently asked my opinion as to whether a treasurer's check issued by a responsible bank or trust company payable to the Commonwealth of Massachusetts accompanying the low bid on a public works project for construction of a Control Tower at Logan International Airport may be accepted by the Division of Building Construction as a proper form of bid security in view of G. L. c. 149, §§ 44A–44D, and in view of the terms of the bidding documents issued to bidders on the project.

The applicable statutory provisions are contained in G. L. c. 149, § 44B, which provides in part as follows:

"Every proposal for any work referred to in section forty-four A shall be accompanied by cash or a certified check on, or a certificate of deposit issued by, a responsible bank or trust company, payable to the commonwealth . . . The awarding authority concerned may, at its option, prescribe and receive a bid bond in lieu of cash, certified check or certificate of deposit. . ."

The bidding documents issued to bidders and labelled "Notice to Contractors" contain the following language on page 1:

"The bid must be accompanied (Attached to inside of front cover of this form) by cash or a certified check on, or a certificate of deposit issued by, a responsible bank or trust company, payable to the Commonwealth of Massachusetts in the amount of at least five per cent (5%) of the total bid price but in no event less than $100 nor more than $50,000. No other form of bid security will be accepted."

The terms of the "Notice to Contractors" appear to be in conformity with the statute. It is noted that the awarding authority has not taken advantage of the option to accept a bid bond.

It is my opinion that a treasurer's check is not an acceptable form of bid security within the meaning of the statute and the bidding documents referred to above. The statute involved provides that only two forms of bid security are acceptable in lieu of cash. The first is a certified check and the second is a certificate of deposit. A treasurer's check does not fall within either of these categories.

The Supreme Court has determined that the statutes regulating the bidding procedure on public works contracts cannot be waived. It is irrelevant that a benefit to the Commonwealth might result from such a waiver. See *Gifford* v. *Commissioner of Public Health*, 328 Mass. 608, 616–617; *East Side Construction Co. Inc.* v. *Adams*, 329 Mass. 347.

It would appear, therefore, that the present contract must be awarded to the lowest responsible bidder who has complied with the statute or, in the alternative, all bids must be rejected. Page 8 of the "Notice to Contractors" contains the following language concerning rejection of bids:

"The right is reserved to reject any and all proposals and to waive informalities. Any unit price bid that contains a unit price which is unduly high or low may be rejected as unbalanced. If a contract for the work is awarded, it will be awarded to the lowest responsible and eligible bidder determined in accordance with the provisions of Gen. Laws (Ter. Ed.) Chap. 149 as amended by Chap. 480, Acts of 1939, and Chap. 699, Acts of 1941."

In the *Gifford* case, at page 616, the court stated that such a "right to reject" did not of itself authorize the awarding authority to make an award in violation of the statute. If action is taken under this clause, a contract can be awarded only after new bids are submitted.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Group Life Insurance Policies for Purchasers of Security — Validity of Contract — Illusory Contract.

APRIL 8, 1954.

Hon. JOSEPH A. HUMPHREYS, *Commissioner of Insurance.*

DEAR SIR: — You have recently asked this department for an opinion relating to group life insurance. From your letter, and from more recent conferences with members of your department, I understand that the facts relating to the group life insurance policy which has been submitted to you for approval are as follows:

"A domestic life insurance company has been requested to issue, under the authority of section 133 (*c*), a group life insurance policy insuring the lives of purchasers of accumulative investment programs who enter into agreements with the vendor of the program to pay the purchase price thereof in instalments. The investment program purchase agreement provides that the purchaser of the program will pay therefor an agreed amount (not exceeding ten thousand dollars), in equal periodic instalments, over a period of not more than ten years. The vendor of the investment program agrees, through a bank acting as an agent of the vendor and custodian of the funds, that it will apply the net amount of all instalment payments to the purchase for the investment program purchaser of shares of an investment trust fund.

"The investment program purchase agreement provides that it may be terminated by the purchaser at any time during his life upon five calendar days' prior written notice delivered to the vendor's agent. If the power to terminate the agreement is exercised by the purchaser, his insurance

coverage under the group insurance policy terminates at the end of the period for which a premium has been paid on his account. Should the purchaser, without terminating the agreement in the manner provided, breach the agreement by defaulting in his obligation to make any instalment payments of the purchase price, the insurance upon his life will, under the provisions of the policy which the Life Insurance Company will issue in this case, automatically cease upon the date any instalment payment becomes thirty-one days overdue. The effect of these provisions is that the insurance coverage will continue in force upon the life of any program purchaser only during the period that he continues to be under obligation to complete payment of the purchase price of the program and has not defaulted in his obligation.

"The investment program agreement further stipulates that in the event of the death of the program purchaser prior to completion of his purchase agreement, that agreement shall be binding upon his estate and the amount of all instalment payments then remaining unpaid shall become immediately due and payable by his estate, the proceeds of the group insurance being applied to complete such payments.

"The power to terminate the investment program which is reserved to the program purchaser during his life is his personal privilege and does not pass to his representatives. If the purchaser dies while the purchase agreement is outstanding, the obligation of his estate is final and binding. The insurance to be issued covers this obligation of the estate."

In addition to the above statement of facts I have examined the proposed agreement between the vendor and the purchaser of the investments and also the form of policy to be issued by the life insurance company.

Your first question is as follows:

"May a domestic life insurance company under the authority contained in subdivision (*c*) of section 133 of chapter 175 of the General Laws issue a group life insurance policy insuring a group of purchasers of securities specified above if the policy complies with the insurance laws in all other respects?"

The answer to your first question is in the affirmative. Section 133 of chapter 175 specifies the purpose for which group life insurance may be issued. Subdivision (*c*) specifically includes "a group of persons who . . . are debtors . . . of the vendor of any property for its purchase price, under an agreement to pay any such indebtedness . . ." The agreement of the purchaser who signs the "application for accumulative investment program" which you have submitted to me is a debtor of a vendor within the meaning of this subdivision (*c*). In such application the applicant makes a specific agreement to continue regular instalment payments until a total amount has been paid. This constitutes a valid contract. The fact that the applicant can terminate his future obligations, and forfeit a certain amount which he has paid and which is to be applied toward insurance and administrative costs, does not make the contract to purchase illusory.

The agreement and policy which you have shown to me indicate facts slightly different, in minor technicalities, from some of the facts set forth in your letter. In the letter you indicate that the insurance coverage will terminate "at the end of the period for which a premium has been paid." The policy, however, indicates that the coverage will terminate at the moment the purchaser of the investment program ceased to be a debtor.

This latter interpretation of the facts makes the agreement and policy consistent with section 133. You suggest in your letter that the insurance to be issued covers the obligation of the estate. This is accurate. However, under our section 133, the insurance proceeds must be paid to the vendor or creditor, not to the estate. This is in fact the provision of the agreement and the policy which you have submitted to me.

Your second question is as follows:

"Do the provisions of section 121 of chapter 175 of the General Laws prohibit the issuance of a group life insurance policy under the authority of subdivision (*c*) of section 133 of said chapter, if said policy proposes to insure a group of purchasers of accumulative investment programs such as are referred to above?"

The answer to your second question is in the negative. On the facts set forth in your letter, and also on the agreements set forth in the printed matter you have submitted to me, there is no inducement passing from the life insurance company in connection with the placing of such group life insurance. Therefore, the arrangement you have submitted to me is not a violation of section 121 of chapter 175. There would, however, be a violation of this section if the life insurance company were identical with the vendor under the investment program, or if the insurance company benefited by or had any connection, direct or indirect, or any officer, agent or broker of the insurance company had any such connection, direct or indirect, with the sale under this investment program. In the facts which you have submitted to me, and in the printed material, there is no indication that there is any such connection or benefit. I have also received your verbal information that there is no such benefit or connection. Therefore, the answer to your second question must be in the negative.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Hospitalization Rates for Prematurely Born Infants — Interpretation of Inconsistent Statutes.

APRIL 8, 1954.

SAMUEL B. KIRKWOOD, M.D., *Commissioner of Public Health.*

DEAR SIR: — You have recently asked this department for an opinion with regard to two apparently inconsistent statutes on the subject of hospitalization rates for caring for prematurely born infants.

The question you present is as follows:

"Which department, the Commission on Administration and Finance as directed under G. L. c. 7, § 30K, or the Department of Public Health as directed under G. L. c. 111, § 67C, is authorized to establish ceiling rates in regard to hospitalization expenses for the prematurely born infant?"

It is my opinion that the provision of G. L. c. 111, § 67C, that the Department of Public Health shall establish ceiling rates for the care and hospitalization of infants weighing four and one-half pounds or less at birth, is effective and operative notwithstanding the later provision, contained in G. L. c. 7, § 30K, as added by St. 1953, c. 636, § 2.

There is little or possibly no inconsistency between these two provisions. Section 67C relates primarily to the payments to be made to a hospital by the board of health of a city or town, whereas section 30K relates primarily to payments by departments, boards or commissions of the Commonwealth. In addition, section 30K relates to "rates" for general classes of patients; whereas section 67C relates to "ceilings" on expenses for premature babies. The inconsistency between the statutes could arise only if, under section 67C, the infant had no legal settlement in the Commonwealth and the hospitalization expense must therefore "be paid by the commonwealth upon the approval of bills therefor."

Under accepted rules for the construction of statutes, where there is the possibility of some inconsistency between two provisions, preference should be given to the statute which covers a particular or minute situation (such as section 67C covers the single and specific matter of premature babies) rather than to a statute which covers a general or broad subject matter (such as section 30K which covers all rates in all hospitals, sanatoria or infirmaries licensed by the Department of Public Health).

Furthermore, accepted rules for the interpretation of statutes prevent an interpretation which will act as an implied repeal of earlier provisions of the law. An express repeal will, of course, be given effect; but a construction should be adopted, if reasonable, which would prevent an implied repeal of existing statutes.

A reasonable interpretation of the two statutes mentioned above requires that specific effect be given to the detailed provisions of section 67C and that section 30K be construed as not applying to the specific instance of prematurely born infants which is referred to in section 67C. This interpretation will give a reasonable and broad meaning to both statutes, and it will give effect to the common rules of statutory interpretation set forth above.

For these reasons your question is answered with the opinion that the Department of Public Health is authorized, under the provisions of G.L. c. 111, § 67C, to establish ceiling rates as to expenses for the care and hospitalization of an infant weighing four and one-half pounds or less at birth.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Public Building Construction — Bid Statute — Extra Work Order — Substantial Change in Original Contract.

APRIL 8, 1954.

Mr. HALL NICHOLS, *Director of Building Construction.*

DEAR SIR: — You have asked this department for an opinion concerning a proposed extra work order in relation to the fireproofing contract at the Phillips Building, Worcester State Hospital.

By contract dated August 17, 1953, the Peabody Construction Co., Inc. agreed to perform certain fireproofing and plumbing renovation work at the Phillips Building for the sum of $243,516. Among other work, the contract called for the installation of concrete slabs in place of wood floor-

ing. After completion of the first of four floors, it became apparent that the walls of the building were not of sufficient strength to support the proposed concrete slabs. The plans of the building submitted to the contractor indicated the presence of solid walls at least eight inches thick. In fact, the walls were not solid, were entirely inadequate to support the proposed new concrete floor slabs and were not even considered safe to support the weight currently placed upon them.

As a result of the foregoing disclosures, an extra work order has been proposed as outlined in a letter from the Director of Building Construction and from the Department of Mental Health directed to the Chairman of the Commission on Administration and Finance. Page 5 of said letter states that the proposed extra work order contemplates "a structural system consisting of columns and beams to support the new reinforced concrete floor slabs entirely independently of the existing brick wall system, including new foundations in the basement for the columns, and structural steel supports for the concrete slabs already poured for the first floor."

The cost of the proposed extra work order is $131,796.35 as compared with the original contract price of $243,516. It is noted that a substantial part of the contract price is made up of items for plumbing, heating, painting and the like which do not relate to the cost of the floor installation.

It is the opinion of this office that the magnitude and nature of the work involved go beyond the scope of work which might be authorized under an "extra work order." A substantial change in the original contract is contemplated calling for the award of a contract only after compliance with the bidding procedure as embodied in G. L. c. 149, §§ 44A–44D. See *Morse* v. *Boston*, 260 Mass. 255; *Morse* v. *Boston*, 253 Mass. 247.

The recommendation for the extra work order states that time and money will be saved if the present contractor can be required to proceed under an extra work order. Benefit to the Commonwealth, however, is not a ground for ignoring the bid statute. See *Gifford* v. *Commissioner of Public Health*, 328 Mass. 608, 616–617; *East Side Construction Co., Inc.* v. *Adams*, 329 Mass. 347.

It should be made clear that the foregoing discussion relates to work which is not required to be done under the terms of the original contract. The mere fact that the plans were in error will not justify the contractor in avoiding his obligation to install the concrete floor slabs in a safe and workmanlike manner. By express terms in the contract, the contractor has stated that his bid is based upon his own examination of the site and that he has not relied on plans, measurements, dimensions, calculations, etc., of the Commonwealth (page 16 of contract). It is further stated that no allowance will be made for errors found in the plans, surveys, etc. (page 17 of contract). It is our opinion that the proposed extra work order probably requires work which could not be insisted on under the original contract.

In summary, it is our opinion that the proposed extra work order should not be approved for the reason that, in magnitude and nature of the work involved, it goes beyond the scope of the original contract and cannot be considered incidental thereto.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

Department of Public Works — Province Lands — Authority of Commissioner to transfer Province Lands from Division of Waterways to Division of Public Beaches.

April 13, 1954.

Hon. John A. Volpe, *Commissioner of Public Works.*

Dear Sir: — This is in reply to your two letters raising the question of your administrative authority to transfer the Province Lands from the Division of Waterways to the Division of Public Beaches, both of which divisions are within your department.

The answer to your question is that you do, as Commissioner of the Department of Public Works, have authority to transfer the Province Lands from the Division of Waterways to the Division of Public Beaches.

The Province Lands have been subject to the control of several administrative agencies. In 1893 the general care and supervision of these lands were given to the "Board of Harbor and Land Commissioners." (St. 1893, c. 470.) In 1916 such board was abolished and its rights and duties were transferred to the "Commission on Waterways and Public Lands," which commission was created at that same time. (St. 1916, c. 288.) In 1919 this latter commission, in turn, was abolished and its rights and duties were transferred to the Department of Public Works established by the same act. (St. 1919, c. 350, § 111.) By section 113 of this act a new "Division of Waterways and Public Lands" was organized in the Department of Public Works, and such division was given the rights and duties of the former "Commission on Waterways and Public Lands." This situation continued for several years, and is indicated in statutory form in the 1921 General Laws of Massachusetts. (G. L. c. 16, § 2; c. 91, § 25.) In 1927 the "Division of Waterways and Public Lands" was consolidated into the Department of Public Works itself, and the word "division" was removed from the statutes and the word "department" was inserted in place thereof. (St. 1927, c. 297.) From that time on the powers and duties most recently conferred upon the Division of Waterways and Public Lands were exercised and performed only by the Department of Public Works.

From 1927 on there was no "Division of Waterways and Public Lands," and the only successor of the original "Board of Harbor and Land Commissioners," to which had originally been given the care and supervision of the Province Lands, was the Department of Public Works. This state of the law required the elimination of the word "division" and the insertion of the word "department" in our General Laws in order to make them conform with existing substantive law. This was done in 1931. (St. 1931, c. 394: — see title and § 71.) Accordingly, the General Laws of Massachusetts in the Tercentenary Edition of 1932 refer to the Department of Public Works as having the supervision of the Province Lands, with no mention at all of any Division of Waterways and Public Lands. (G. L. c. 91, § 25.)

In 1938 an entirely new "Division of Waterways" was established in the Department of Public Works. (St. 1938, c. 407). This division has no connection with any of the original commissions or boards or divisions, and is not a successor to any of them. Another division, the "Division of

Public Beaches," was also established in the Department of Public Works in 1953. (St. 1953, c. 666.)

There is nothing in any of our existing Massachusetts statutes which indicates that the Province Lands are or have been within the jurisdiction of the existing Division of Waterways. If that be a fact, it was accomplished by a direction of you or your predecessor under your general administrative authority under chapter 16 of the General Laws, and the paramount authority to deal with the Province Lands still remains in the Department of Public Works and in you as the executive and administrative head of that department. Therefore, you have authority at the present time to transfer the Province Lands out of the Division of Waterways and into the Division of Public Beaches.

It may be that under the 1953 statute creating the Division of Public Beaches, particularly under section 2 which adds a new section 61 to chapter 91 of the General Laws, the Province Lands have already been transferred to the Division of Public Beaches. This would be so if the entire area of the Province Lands comes within the description "any ocean beach" in said section 61. In view of the large area and varied character of the Province Lands it is possible that this new section 61 does not operate as an automatic transfer of all the Province Lands to the Division of Public Beaches.

The opinion set forth above, indicating your authority to transfer the Province Lands from the Division of Waterways to the Division of Public Beaches, is based upon the statutory history set forth above, and is not based in any way upon the 1953 act relating to the Division of Public Beaches.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

State Employee — Re-employment of Disabled Veteran — Voluntary Resignation of Veteran.

APRIL 14, 1954.

ALTON S. POPE, M.D., *Deputy Commissioner, Department of Public Health.*

DEAR SIR: — You have recently made inquiry concerning the re-employment of a disabled veteran. Your question concerns —

". . . the obligation of the Westfield State Sanatorium to re-employ a disabled veteran who had voluntarily resigned from his position as Institution Porter at Westfield after slightly less than three years of service, with a written resignation. This man claims that as a disabled veteran he is entitled to reinstatement regardless of whether the appointing authority considers his reappointment for the best interest of the service."

Under the facts set forth in your question, the present statutes of Massachusetts do not place you under any legal obligation to re-employ the disabled veteran who voluntarily resigned from his position.

Our laws contain many provisions which protect and prefer veterans and especially disabled veterans in and to State service. There are also numerous statutes protecting veterans in State service from being invol-

untarily separated from such employment. There are also statutes which protect any State employee who resigns his employment in order to enter the military or naval forces of the United States. I have made particular examination of G. L. c. 30, § 9A, and of St. 1941, c. 708, § 1. However, neither of these statutes gives any protection to a veteran who leaves the State service under a voluntary written resignation. In our civil service statute a resignation is defined as "a permanent voluntary separation from the service." G. L. c. 30, § 1.

Because the veteran in your case "voluntarily resigned from his position" his employment relation with the Commonwealth came to a permanent and complete end. Because of such resignation, the statutes as they now exist do not give such veteran a right to his former employment. But he is, of course, entitled to preference in making application for new employment and such preference will be given to him upon an application in the usual form.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Zoning Enabling Law (G. L. c. 40A) — Effect on Existing Zoning Ordinances and By-laws.

APRIL 30, 1954.

His Excellency CHRISTIAN A. HERTER, *Governor of the Commonwealth.*

SIR: — You have submitted to me for examination and report enacted bill numbered Senate 376, entitled "An Act to amend the Zoning Enabling Law."[1]

This bill amends chapter 40 of the General Laws by striking out the eight sections numbered 25 to 30B, inclusive, conferring upon the cities and towns in the Commonwealth the power to regulate the use of the land and buildings within their corporate limits, to establish boards of appeal created for the purpose of cushioning and adjusting individual hardship cases and providing for the protection of the rights of those injured by the improper enforcement of the zoning laws and the rules and regulations issued thereunder, and inserting a new chapter 40A in the General Laws, entitled "The Zoning Enabling Act" containing twenty-two sections covering in a general way the same subject matters.

The legislation apparently proceeds upon the premise that the subject of zoning is of such importance that it should be treated in a separate chapter in the General Laws, and the new act carries forward most of the provisions of the present sections 25 to 30B, inclusive. There are numerous minor perfecting changes in the existing law but very few, if any, which alter the substantial structure of the present provisions.

I note that section 1 of this legislation strikes out sections 25 to 30B, inclusive, of chapter 40 which provide the authority for the cities and towns to enact zoning ordinances and by-laws. However, I also observe that by the terms of section 3 of this legislation the provisions of the new chapter

[1]Approved by the Governor on May 3, 1954, to become chapter 368 of the Acts of 1954.

". . . so far as they are the same as those of sections twenty-five to thirty B, inclusive, of chapter forty of the General Laws, shall be construed as continuations of said provisions, and the enactment of this statute shall not affect the validity of any action lawfully taken under said provisions prior to the effective date of this act." Since the new act reinstates in substance and in many cases the precise verbiage of the present legislation and is obviously intended to continue the present zoning laws in a perfected form, I am unable to say that the vitality of the existing zoning ordinances and by-laws of the various cities and towns is impaired. The Supreme Court said in the case of *Brett* v. *Building Commissioner of Brookline*, 250 Mass. 73, 80, "All property is held subject to the police power." Of course, reasonable zoning laws are an exercise of the police power. Moreover, the court has many times said that "Every presumption is indulged in favor of the validity of a statute." *Talbot* v. *Hudson*, 16 Gray 417, 424. *Lowell Co-operative Bank* v. *Co-operative Central Bank*, 287 Mass. 338, 343. *Howes Brothers Co.* v. *Unemployment Compensation Commission*, 296 Mass. 275, 284.

The bill appears to be in proper form, and if enacted into law would, in my opinion, be constitutional.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

State Purchasing Agent — Effect of "Purchase Order" as a Contract — Right to Cancel — Interest of State Officer in Public Contract.

MAY 6, 1954.

Hon. JOHN A. VOLPE, *Commissioner of Public Works.*

DEAR SIR: — Your recent letters, referring to the highway resurfacing work performed by the William A. Jones Co., request an opinion as to whether or not, upon the basis of the facts set forth therein, payment to said company would be legal and proper.

The facts submitted to us are as follows:

On October 2, 1953, the Department of Public Works sent to the State Purchasing Agent a requisition for the surfacing of a public highway in Barnstable. Thereafter, the State Purchasing Agent sent out information as to this work, bids were received, the Department of Public Works approved the lowest bid, and on October 19 the Comptroller encumbered the appropriation for the estimated cost of the job. Notification, by means of a "Purchase Order" dated October 15, was mailed on October 19 to the William A. Jones Co., whose bid was the lowest. The Jones Company received the "Purchase Order" on October 22. This "Purchase Order" carried an instruction that work was to proceed "upon receipt of instructions." It also was accompanied by a mimeographed "Special Provisions for Resurfacing Projects" which provided, in addition to certain detailed specifications as to resurfacing, that the successful bidder "must furnish list of sources of material," and also "must list all outstanding orders for bituminous concrete on State Highways." Said "Purchase Order" was also subject, until performance by the Jones Company, to change or cancellation at the option of the Commonwealth. Sometime after October 22 a representative of the Department of Public Works inspected the site of the proposed resurfacing, determined that more material was necessary

than was specified in the original "Purchase Order," and as a result of such representative's report, a second "Purchase Order" dated November 6 was sent to the Jones Company for the additional quantity of material which was necessary for this resurfacing job. Immediately upon receipt of the second "Purchase Order" the Jones Company started the work, and completed the job on November 20. On November 20 the Jones Company billed the Commonwealth under both "Purchase Orders." Payment was duly made under the second "Purchase Order," but no payment has yet been made under the first "Purchase Order." The reason for the failure of payment under the first "Purchase Order" was because of the provisions of G. L. c. 268, § 10, in that, until the date of October 20, the treasurer of the Jones Company was a member of the Massachusetts House of Representatives. On October 20 the Representative resigned his office as treasurer and from that date on he has had no interest, direct or indirect, in the Jones Company.

General Laws, c. 268, § 10, provides as follows:

"A member of the general court, or of the executive council, or of a state department or commission, who is personally interested, directly or indirectly, in a contract made by the general court or by either branch thereof or by such department or commission or by its authority, in which the commonwealth is an interested party; . . . shall be punished by a fine of not less than fifty nor more than one thousand dollars or by such fine and imprisonment for not more than one year."

The above statute is applicable to a "contract." If, in the present case, there is no "contract," then the statute is not applicable.

In my opinion, upon the facts in this case, there was no contract until after the time the member of the General Court had resigned his position as treasurer. The facts indicate that from that time on "he has had no interest, direct or indirect, in the Jones Company."

In order to have a legal bilateral contract there must be a binding obligation on both parties. In the present case the "Purchase Order" sent by the Commonwealth to the Jones Company was "subject, until performance by the Jones Company, to change or cancellation at the option of the Commonwealth." The Commonwealth was under no binding obligation, and therefore there was no contract in existence. The right of cancellation prevented the formation of a binding contract. *Bernstein* v. *W. B. Manufacturing Co.*, 238 Mass. 589. Williston on Contracts, § 43 n. 21, § 104 n. 12. The transaction was merely a "Purchase Order," as the document sets forth, and it was not a contract.

In some instances the submission of a bid to and its acceptance by the Commonwealth would result in a completed contract upon such acceptance. Williston on Contracts, § 31. But there would be no contract upon acceptance of a bid if something further were contemplated. *Franklin A. Snow Co.* v. *Commonwealth*, 303 Mass. 511, at 516. Op. Atty. Gen., 1940, pp. 77, 78. Williston on Contracts, § 31 nn. 5, 6. In the present case after the "Purchase Order" was sent to the Jones Company on October 19, there still remained the matters of (1) the instruction to proceed with the work, (2) the list of "sources of material," (3) the list of "outstanding orders" and (4) the possibility of cancellation before the work started. In fact, the instruction to proceed with the work was delayed, because of the need for additional material, until such further material had been or-

dered by a later purchase order. In the present case it is clear that there is no bid which was accepted by the Commonwealth in such a way as to create a contract; but that on the contrary all we have is a "Purchase Order" as the document itself sets forth.

The contract in the present case came into existence only upon the performance by the Jones Company of the work called for by the "Purchase Order" and by the acceptance of that work by the Commonwealth. This took place about a month after the member of the General Court had ceased to have any interest in the work or in the contract involved in Purchase Order No. 304113.

In conclusion, upon the facts set forth in your letters, you are advised that payment to the Jones Company of the amount called for by Purchase Order No. 304113 is legal and proper.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Group Insurance — Retired State Employee — Proceeds after Retirement

MAY 12, 1954.

MR. HERMAN B. DINE, *Director of Accounts.*

DEAR SIR: — Your recent letter poses the following question:

"I shall appreciate it if you will advise me if employees, originally covered by group insurance under G. L. c. 40, § 5, cl. (44), and later retired, may continue to receive the benefits of the above statute."

In my opinion they may, provided they bring themselves within the provisions of sections 133 to 138A, inclusive, of chapter 175 of the General Laws, and subject to the limitations hereinafter referred to.

Said sections make provisions for group life insurance of certain employees including "the members of any association of state, county or municipal employees, who are regularly and permanently employed by the commonwealth, a county or a municipality . . ." Section 134 of chapter 175 provides "Any policy issued under section one hundred and thirty-three may provide that the term 'employee' shall include retired employees . . . ." It should be here noted that the words "*may* provide" are used by the General Court rather than the phrase "*shall* provide."

Clause (44) section 5 of chapter 40 obviously is intended to provide for municipal financing of group life insurance covered by sections 133 to 138A, inclusive, of chapter 175. It will be seen that the group life insurance provisions, so far as they relate to municipal employees, were intended to apply to "employees" and no one else. A retired employee would not ordinarily come within the definition of the word "employee." He does not receive any "gross compensation" nor indeed "compensation" but receives a retirement allowance — quite a different thing. It was for this reason, I believe, that section 134 was amended to provide "Any policy issued under section one hundred and thirty-three *may* provide that the term 'employee' shall include retired employees . . . ." It will be noted, as before stated, that this provision does not *require* that the policy include retired employees but leaves it optional.

Accordingly, as I have said before, it is my opinion that if the policy in question is written so as to define "employee" as including "retired employees" the answer to your question is in the affirmative, otherwise in the negative.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Income Tax Return — Service of Notice of Delinquency on Prisoner.

MAY 12, 1954.

Hon. WILLIAM A. SCHAN, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You have recently made inquiry regarding the failure of a prisoner to file an income tax return.

Your first question is as follows:

"If the taxpayer's wife signs for receiving the registered mail notice while the taxpayer is incarcerated, has he been duly notified?"

In my opinion this question must be answered in the negative. The statute (G. L. c. 62, § 56) provides for a punishment if a person "without reasonable excuse fails to file a return within twenty days after receiving notice from the commissioner of his delinquency . . ." I think that receipt by the taxpayer's wife while the taxpayer is incarcerated does not comply with the requirement for the taxpayer himself "receiving notice from the commissioner."

Your second question is as follows:

"If a taxpayer is given the twenty-day notice while he is incarcerated does the twenty-day period start to run while he was so distrained?"

In my opinion the answer to this question is in the affirmative. Our statute which relates to the tolling of a limitation for commencing an action makes reference to a prisoner only when he is in the position of the plaintiff. G. L. c. 260, § 7. Under the provisions of G. L. c. 127, § 6, it is possible to serve legal process upon a prisoner. In a case dealing with the six-year period of the statute of limitations, in an ordinary action of contract, it was held that the defendant's incarceration in prison did not toll the statute. *Turner* v. *Shearer*, 6 Gray (72 Mass.) 427. See also the recent annotation on this subject in 24 A. L. R. 2d at pages 618 and 626.

But there remains a question of doubt even as to this second question because of the requirement that your notice must have been "received" by the taxpayer. If service is made under the provisions of G. L. c. 127, § 6, you must be sure that the process is actually received by the taxpayer.

Your third question is as follows:

"If the twenty-day period does not start to run while the taxpayer is incarcerated, does it begin to run when he is freed or should another notice be served on him to start the twenty-day period running?"

In view of my answer to your second question, indicating that there is no tolling of this period of twenty days because the taxpayer is incarcerated, there is no occasion to answer this third question. However, in view

of the negative answer to your first question, and of the possible doubt occasioned by the necessity that the prisoner must actually "receive" your notice, it seems to me that as a practical matter you should have a new notice served upon the taxpayer after he is freed. I see no great difficulty in this procedure, subject, of course, to the applicable statute of limitations, and such suggested procedure would cover all of your doubtful matters.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Workmen's Compensation — Self Insurance by Separate Division of Corporation otherwise Covered by Insurance.

MAY 17, 1954.

Mr. EDWARD P. DOYLE, *Secretary, Division of Industrial Accidents.*

DEAR SIR: — You have recently written this department with reference to the application of the American Bridge Division to act as a self-insurer.

I note from your letter that —

"the American Bridge Division, a part of the United States Steel Corporation, which is operated as a somewhat independent unit of said corporation with large scope of autonomy in such operation, has applied to the Division of Industrial Accidents, as provided in G. L. c. 152, § 25A, for license as a self-insurer in this Commonwealth. The United States Steel Corporation is insured in this Commonwealth under workmen's compensation with the Liberty Mutual Insurance Company."

Upon this state of facts you ask the following question:

"Question has arisen as to whether or not the Division of Industrial Accidents may approve the application of said American Bridge Division for license as a self-insurer aforesaid as having the status of an 'employer' as the latter term is defined in the Workmen's Compensation Law?"

Subject to the technical correction in the last paragraph of this letter, your question must be answered in the affirmative, that is, that you have authority to approve the application of the American Bridge Division as a self-insurer.

Under G. L. c. 152, § 1, "employer" is defined as "an individual, partnership, association, corporation or other legal entity . . . employing employees subject to this chapter." The provisions applicable to self-insurance are contained in section 25A of such chapter.

Under *Pallotta's Case*, 251 Mass. 153, it is possible for an employer to be insured for workmen's compensation purposes as to some of his employees and not insured for other employees in a portion of the employer's enterprises which has "no natural connection, with the portion which is covered by insurance." I believe this principle applies to the American Bridge Division. In its application for the provision of being a self-insurer the following statement of fact is set forth:

"Although American Bridge Division is an operating division of United States Steel Corporation, its operations (in Massachusetts and elsewhere) are carried on wholly apart from those of other divisions of the Corporation. The Division has its own administrative staff, including accounting department, contracting, erecting and operating departments, as well as a casualty department for the administration of workmen's compensation for Division employees. Payrolls are of course separate from those of other divisions and pay checks are drawn on American Bridge Division accounts. Its work in Massachusetts, other than a small sales office, is confined exclusively to the erection of structural steel and American Bridge is the only division of United States Steel Corporation engaged in such work."

The possibility that a single employer could be covered by workmen's compensation as to one part of its business but not covered as to a "wholly different and distinct" kind of business "quite disconnected . . . in place, nature and management" with the business covered is clearly recognized in *Cox's Case*, 225 Mass. 220, at 223. A direct holding to this effect was made in *Pallotta's Case*, supra. The present law in Massachusetts is clearly stated in *Anderson's Case*, 276 Mass. 51, at 52, as follows:

"It was decided in *Cox's Case*, 225 Mass. 220, that the workmen's compensation act does not permit an employer to insure his employees in one part of his business and remain a nonsubscriber as to the rest of the business which, in substance and effect, is conducted as one business. It was expressly stated in that case that two wholly different and distinct kinds of business disconnected from each other in place, nature and management were not included within the scope of the decision. . . . In *Pallotta's Case*, 251 Mass. 153, it was decided that an employer who conducted two separate and distinct kinds of business could become a subscriber as to one part of the business without insuring his employees in the different and distinct business."

A situation in which only a portion of the employees of an employer are covered is set forth in the case of *Maryland Casualty Co.* v. *Taunton*, 294 Mass. 69. *Stoltz's Case*, 325 Mass. 692, is not inconsistent because in that case it is stated (page 695) that:

"The city, as a single political entity, accepted the act by vote of its electorate and not by the individual departments into which it is organized."

There are several cases in Massachusetts in which the principle that a single employer may be covered as to a portion of his employees and not as to all of them is clearly recognized. In several cases the court, in holding that all employees of a single employer are covered, distinguishes the situation before them from *Pallotta's Case* by saying that the work of the separate groups of employees was not "two wholly different and distinct kinds of business quite disconnected with each other in place, nature and management." These cases are as follows: *Phalen's Case*, 271 Mass. 371, 373. *Shannon's Case*, 274 Mass. 92, 94. *Wright's Case*, 291 Mass. 334, 335–6. *Fidelity & Casualty Co. of New York* v. *Cook*, 301 Mass. 305, 307. *Employers Mutual Liability Insurance Co.* v. *Merrimac Mills Co.*, 325 Mass. 676, 680–1.

The statement of facts regarding the American Bridge Division of the United States Steel Corporation apparently brings it within this principle

of law. Accordingly, it is permissible for you to approve self-insurance for this portion of the United States Steel Corporation's business even though other portions are covered in different ways.

There is one technical correction which should be made if the application of the American Bridge Division is to be approved. The employer in this case, legally, is the United States Steel Corporation, not the American Bridge Division. The American Bridge Division has no separate legal existence apart from the United Steel Corporation. The Division could not be sued as such, but rather any court action would have to be against the corporate entity which is the United States Steel Corporation. Accordingly, if you give approval to this application for such self-insurance it should be in the name of the United States Steel Corporation covering the business and employees of the American Bridge Division of such employer.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Change of Name of Educational Institution — Springfield College — Referral to Board of Collegiate Authority — Interpretation of Statute.

MAY 17, 1954.

Hon. JOHN J. DESMOND, Jr., *Commissioner of Education.*

DEAR SIR: — You have recently asked this department for an opinion with reference to change of name of "International Young Men's Christian Association College, Springfield, Massachusetts," to "Springfield College."

Your question is as follows:

"I shall appreciate it if you will advise me if it is necessary for the Certificate of the Trustees for Change of Name of International Young Men's Christian Association College to Springfield College to be referred to the Board of Collegiate Authority in accordance with G. L. c. 69, § 30."

The answer to your question is in the affirmative, that is, that the articles of amendment providing for the change of name to the new name of "Springfield College," must be referred by the Commissioner of Corporations and Taxation to the Board of Collegiate Authority in accordance with the provisions of G. L. c. 69, § 30.

The provisions of said chapter 69, section 30, relate to certificates of organization of a corporation and articles of amendment providing for the power to grant degrees, and also to —

"articles of amendment to the charter of an existing educational institution . . . changing its name to a name which will include the term 'college,' 'junior college' or 'university' . . ."

If the articles of amendment provide for such a change in name the articles must then be referred to the Board of Collegiate Authority for investigation, publication and hearing. It is clear that the new name, "Springfield College," to which the name of this educational institution has been changed, is a "name which will include the term 'college.'"

Accordingly, the provisions of this statute must be complied with in connection with the change of name set forth above.

An argument to the contrary could be made with apparent validity upon the basis that this kind of a change, from one name including the term "college" to a different name but which also includes the term "college," was not within the intention of the Legislature. A plausible argument discussing the legislative intention in cases like the present could be made, but the interpretation of this section 30 should be based upon the words of the statute itself and not upon an assumed intention of the Legislature which is contrary to the plain meaning of the statute. In order to construe the statute as not applying to a change from one name which includes the word "college" to a different name which also includes the word "college," the statute must be read as though it provided for reference to the Board of Collegiate Authority only when the amendment was one "changing its name to . . . include the term 'college.'" But this construction eliminates words which have been inserted in the statute by the Legislature. Recognized canons of statutory interpretation require that all words be given some meaning and value, and that it cannot be presumed that the Legislature inserted certain words without intending that they should have meaning. To construe section 30 as not applying to a change of the character before us would violate these canons of statutory construction and would ignore the plain meaning of the statute as adopted by the Legislature. The legislative history of this particular provision confirms my opinion that the statute includes the kind of change now being considered. When this proposed statute was first presented to the Legislature in the session of 1943 (see Senate bills No. 485 and No. 520 of 1943) the wording called for a referral of a change of name to the Board of Collegiate Authority when such change provided "for authority to use the designation of 'college,' 'junior college' or 'university' . . ." This phrasing could very clearly be interpreted to cover a new name which for the first time included the word "college" but to exclude the situation in which the word "college" was present in both the original name and in the new name. This particular phrasing, however, was abandoned by the Legislature in order to provide (see House, No. 1860 of 1943) for the phrasing which is now included in section 30 of chapter 69 of the General Laws. Because of this deliberate, and presumably intended, change of the wording of this part of the statute, it could not be said that the statute in its present clear form should be given a meaning contrary to the literal words and in accordance with an earlier phraseology which had been abandoned by the Legislature.

As indicated above, the answer to your question is that the article of amendment covering the change of name in the present case must be referred to the Board of Collegiate Authority for proceedings under G. L. c. 69, § 30.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

General Court, and Its Committees and Commissions — Penalty for Failure to appear as Witness after Summons — G. L. c. 3, § 28A.

May 18, 1954.

His Excellency, Christian A. Herter, *Governor of the Commonwealth.*

Sir: — You have submitted to me for examination and report enacted bill numbered Senate 716, entitled "An Act providing a Penalty for the Refusal by a Witness to appear, testify or produce Papers before the General Court or Either Branch Thereof or before Committees or Commissions acting under Authority Thereof."[1]

This bill adds a new section to chapter 3 of the General Laws which chapter deals with the General Court. The new section, 28A, makes it a misdemeanor for any person who has been summoned as a witness to appear before the General Court or any committee or commission thereof to fail to appear or to refuse to testify after appearance. This bill which has been submitted to you for signature properly provides that the failure to appear must be a "wilful" default, and that the failure to answer questions must be a refusal "without constitutional right." Commission of either of these offenses is made a misdemeanor punishable by a fine of one hundred dollars to one thousand dollars, or imprisonment for thirty days to one year, or both. Prosecution under this new statute must be preceded by an order therefor adopted by the General Court or by either branch thereof. Upon certification of such order the prosecution of the matter will be in charge of the Attorney General or the appropriate district attorney. This proposed new statute preserves the usual and existing constitutional powers of the General Court to punish for contempt.

A substantially similar statute has existed for almost one hundred years under our Federal laws. U. S. C. Title 2, § 192. The fact that the Massachusetts Constitution gives to the General Court express power to punish for contempt does not bar the enactment of a criminal statute covering the matter. *Whitcomb's Case*, 120 Mass. 118, 124. *Jurney* v. *MacCracken*, 294 U. S. 125, 151. The fact that misconduct by a person may be punishable as contempt of the Legislature and also be a misdemeanor under the criminal law does not constitute double jeopardy. *Dolan* v. *Commonwealth*, 304 Mass. 325, 344. *In re Chapman*, 166 U. S. 661, 672. Statutes making it a crime not to respond to a proper summons are common in our existing Massachusetts laws. G. L. c. 178, § 27; c. 233, §§ 5, 13, 13A. The recent Advisory Opinion of the Supreme Judicial Court (House No. 2758), 331 Mass. 764, relates to legislative contempts and does not affect the provisions of this bill for criminal penalties which has been submitted to you.

The bill appears to be in proper form, and if enacted into law would, in my opinion, be constitutional.

Very truly yours,
George Fingold, *Attorney General.*

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[1] Approved by the Governor on May 20, 1954, to become chapter 454 of the Acts of 1954.

Public Contract — Acceptance of Written Bid — Signed Check Constituting Signature.

May 18, 1954.

Ernest W. Dullea, Esq., *General Counsel, State Airport Management Board.*

Dear Sir: — You have recently written this department concerning the bid submitted by William Gens & Sons, Inc. and have asked the following question:

"Can the State Airport Management Board award a contract for work at Logan Airport to the lowest bidder, whose proposal to perform such work was not signed, but which was accompanied by a certified check, payable to the Commonwealth, as a proposal guaranty?"

The facts indicate that William Gens & Sons, Inc. submitted a bid on the form prescribed by the board but, through inadvertence, neglected to sign the bid on the line reserved for that purpose. The business address of the corporation and the name of the president and treasurer were listed in the bid. In addition, the bid was accompanied by a certified check in the amount of $500 payable to the State Airport Management Board and signed by Wm H. Gens on behalf of Wm Gens & Son, Inc. The check bore the printed inscription "Wm Gens & Son Inc Electrical Service Boston, Mass." In the upper left hand corner of the check appeared the words "Plan Deposit Generator."

In the light of the foregoing facts, your question is answered in the affirmative. The bid relates to the furnishing and connecting of a portable generator. It is governed by the provisions of G. L. c. 29, § 8A, which provides in part:

"Proposals for any contract subject to this section shall be in writing . . ."

The term "in writing" is defined by G. L. c. 4, § 7, cl. 38, which provides:

" 'Written' and 'in writing' shall include printing, engraving, lithographing and any other mode of representing words and letters; but if the written signature of a person is required by law, it shall always be his own handwriting or, if he is unable to write, his mark."

Chapter 29 requiring that the proposal be "in writing" does not require a "written signature" as described in chapter 4, section 7, although general principles of law may require that a written offer for a contract be "signed." The distinction between "signing" and a "written signature" has often been recognized. *Cf. Irving* v. *Goodimate Co.*, 320 Mass. 454, 459.

In the present case, although the written signature was omitted from the bid, the bid may still be considered as "signed," when it is read together with the signed check which accompanied it. Both documents are part of the same transaction and it appears from an examination of both documents that the check was signed in connection with the bid. Restatement of Contracts, Sec. 208. *Cf. Nickerson* v. *Weld*, 204 Mass. 346, 355.

It is clear that the contractor has not complied with Article 5B of Standard Specifications for Airport Work which requires a written signature. But the board has reserved the right to waive any informality (see "Notice to Contractors") and may, if it desires, waive this informality in respect to the manner of signing the bid.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By JOSEPH H. ELCOCK, Jr.,
Assistant Attorney General.

Neglect of Minor Children — Persons Subject to Penalty — Conduct which is Subject to Penalty — G. L. c. 273, § 1.

MAY 28, 1954.

His Excellency CHRISTIAN A. HERTER, *Governor of the Commonwealth.*

SIR: — You have submitted to me for examination and report enacted bill numbered House 2636, entitled "An Act relative to offences and punishment for neglect of minor children."[1]

This bill amends section 1 of chapter 273 of our General Laws, which section deals with the offences of desertion and nonsupport and improper care of a minor child and provides punishment of a fine of not more than two hundred dollars or imprisonment for not more than one year, or both. The bill which has been submitted to you for signature makes an important amendment in the part of this section which relates to the care of minor children. Two changes are proposed by this new amendment. The first change specifies that the persons subject to punishment shall not be limited to "any parent," which is the provision in the existing law, but that the statute shall apply to "any parent of a minor child, or any guardian with care and custody of a minor child, or any custodian of a minor child." The general inclusion of "any custodian" is very broad, but nevertheless it seems to me that this change to include the guardian or custodian is a proper change.

The second change, which is of more doubtful character, relates to the conduct which is prescribed. The present statute penalizes the conduct of any parent

". . . whose minor child by reason of the neglect, cruelty, drunkenness, habits of crime or other vice of such parent is growing up without education, or without salutary control, or without proper physical care, or in circumstances exposing such child to lead an idle and dissolute life, . . ."

The new proposal penalizes conduct of a parent or a guardian or a custodian

". . . who wilfully fails to provide necessary and proper physical, educational or moral care and guidance, or who permits said child to grow up under conditions or circumstances damaging to the child's sound character development, or who fails to provide proper attention for said child, . . ."

The exact extent and nature of the changes accomplished by the proposed amendment are difficult to predict. The restriction in the existing

[1] Approved by the Governor on June 1, 1954, to become chapter 539 of the Acts of 1954.

law, which limits the statute to undesirable conditions affecting the child which are caused "by reason of" certain specific vices of the parent, has been abandoned in the proposed amendment. The proposed new law refers to certain general undesirable conditions affecting the child and provides that the parent or guardian or custodian who "fails" or "wilfully fails" to provide desirable conditions or who "permits" the undesirable conditions to exist shall be guilty of a crime and shall be subject to the penalties provided.

The proposed amendment, as is obvious, broadens to a very considerable extent the prohibitions of the statute. Two possible objections, which I call to your attention, grow out of this wider provision. The first is that the statute is now so broad, and in certain particulars is so vague, that it may be more extensive in its application than is actually intended by the Legislature. It is possible to see that almost any normal parent, whose child does not develop with a sound moral character, may be held to be in violation of some portion of the proposed wording. The other risk is that the very broadness and vagueness of the statute may become the basis of an argument that it is unconstitutional. As you are aware, a criminal statute, in order to be constitutional, must be sufficiently specific so that a person can determine whether his conduct will be in violation of the statute.

In spite of the two possible criticisms which I have mentioned, in the above paragraph, I feel that you would be warranted in signing the bill. We can assume that the courts will give the statute a reasonable interpretation and will not extend its provisions to situations which could not have been within the intention of the Legislature. As to the argument of unconstitutionality, I think you would be entitled to rely upon the very strong presumption of the constitutionality of any duly enacted statute. While I can see arguments against constitutionality, I cannot say that such arguments overcome this presumption of constitutionality.

In view of the great need for more effective legislation in this field of parental care of minor children, and in view of the careful attention which has been given to this statute by the Legislature as well as by the Special Commission on Public Welfare Laws, I believe you are warranted in approving this proposed statute.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Department of Public Works — Division of Waterways — Use of Capital Outlay Funds for Construction of Fences.

JUNE 2, 1954.

Hon. JOHN A. VOLPE, *Commissioner of Public Works.*

DEAR SIR: — You have requested an opinion as to the validity of the proposed expenditure of funds appropriated under Item 7622–01 (Capital Outlay, St. 1952, c. 604) "for the improvement, development, maintenance and protection of rivers, harbors, tidewaters, . . . ," for the erection of fences in the area to be improved or developed.

In my opinion, the expenditure for fences would be entirely valid as a reasonable and proper incident to the "improvement, development, main-

tenance and protection of rivers, harbors, tidewaters," etc. The construction of a fence as a precautionary measure in hazardous areas could well be construed as an "improvement" in itself.

It should be kept in mind, however, that expenditures under St. 1952, c. 604, Item 7622–01, are therein made expressly subject to the provisions of G. L., c. 91, § 11, with which you are doubtless already familiar.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By JOHN V. PHELAN,
Assistant Attorney General.

Wire Tapping or Use of Dictaphone — Proposal to Restrict Power of Attorney General and District Attorneys — Veto by Governor.

JUNE 9, 1954.

His Excellency CHRISTIAN A. HERTER, *Governor of the Commonwealth.*

SIR: — You have submitted to me for examination and report enacted bill numbered Senate 144, entitled "An Act restricting the authority of the attorney general and district attorneys to authorize wire tapping."

This bill amends our "eavesdropping" statute found in G. L. c. 272, § 99. The present law has been on our books without change since 1920. It provides that, with one exception, the use of an instrument such as a "dictagraph or dictaphone," or the act of "tapping any wire," with intent secretly to overhear conversations of others, is a crime, and that the guilty party shall be punished by not more than two years in jail or a fine of not more than one thousand dollars, or both. The present statute was held constitutional in *Commonwealth* v. *Publicover*, 327 Mass. 303. The exception specified in the statute is that wire tapping or the use of an instrument such as a dictaphone is legal "when authorized by written permission of the attorney general of the commonwealth, or of the district attorney for the district."

The proposed amendment which has been submitted to you for signature restricts the authority of the Attorney General and of the district attorneys by requiring them first to obtain an order from a justice of the Supreme Judicial Court or Superior Court permitting wire tapping. Section 2 of the proposed bill adds new section 99A to chapter 272, which new section spells out in detail the procedure for obtaining a court order relating to wire tapping. Section 1 of the proposed bill amends the present section 99 by restricting authorization by the Attorney General or a district attorney to cases in which the court order under new section 99A has been issued.

I believe the proposed change would be against public interest. The first and most important reason is that the proposed restriction is unrealistic and impracticable. The situation is clearly stated by the Judicial Council in its recommendation against the change. The members of the Judicial Council state as follows:

"This bill would 'hamstring' the public law enforcement officers in investigating crime at a time when organized criminals, throughout the

country, are violating every law of God and man, by murder, robbery, rape, kidnapping, treason, etc. . . . It would give offenders a still better chance for every form of criminal activity against law-abiding citizens with less fear of detection, thus leaving the people still more unprotected by their laws."

This proposed amendment was under consideration by the Legislature in 1953 and was referred to the Judicial Council at that time. The report which the Judicial Council made to you under date of December, 1953 (1954 Public Document No. 144, pages 39–42), recites that the members of the Judicial Council believe that this proposal "should be opposed in the public interest."

The situation is not changed by the new provision added by the present Legislature giving authority to the Attorney General and to the district attorneys to act "in case of emergency and when no such justice is available," but providing that "on the next day" the law enforcement officer must apply for and obtain the required court order under the detailed procedural provisions of proposed section 99A. The arguments that last year's bill is impracticable apply with equal force to the prohibition in the present bill against the continuance of legal wire tapping without the issuance of the required court order. The added complication caused by the suggested "emergency" provision makes the bill even less workable.

I know of no instance, during the entire 34 years that the present law has been on our statute books, where this law has been abused. It is my opinion that the present is no time to restrict the prosecuting officers of the Commonwealth in their use of this potent weapon against crime. The enforcement of law and order in our community would be hampered were this measure to be passed. Last year the district attorneys of the Commonwealth were recorded as being against this measure. I understand that they feel the same about the present bill.

A second objection to the proposed amendment is that it is unreasonably broad in its present form. You will note that the present section 99 covers both wire tapping and also the use of a dictaphone or similar instrument. Section 1 of the proposed amendment forbids both of these acts except when an order is issued under section 99A. But section 99A, as added by section 2 of the proposed amendment, permits issuance of a "wire tapping" order only. There is no provision for a court order relating to dictaphone use. This is the only interpretation that can be given to the clear wording of the proposed amendment. Under this interpretation the effective use of wire tapping by enforcement officials would be seriously hampered, but the use of the "device commonly known as a dictagraph or dictaphone, or however otherwise described, or any similar device or arrangement" would be absolutely prohibited without exception.

In the third place, I suggest to you that the present time, when the Federal law enforcement officials are seeking to obtain the legal right to use wire tapping in their battle against increasing crime, is not the proper time to restrict our own law which has been in successful use, without abuse, for some 34 years. Many voices are being raised currently in favor of giving this right to the proper Federal law enforcement officials. Some of these statements are quoted in the latest report of the Judicial Council (pages 41, 42). As an example, I call your attention to the dissenting opinion of Mr. Justice Sutherland in *Nardone* v. *United States*, 302 U. S. 379, at pp. 385–387, which he closes with the following statement:

"In the light of the deadly conflict constantly being waged between the forces of law and order and the desperate criminals who infest the land, we well may pause to consider whether the application of the rule which forbids an invasion of the privacy of telephone communications is not being carried . . . to a point where the necessity of public protection against crime is being submerged by an overflow of sentimentality."

I respectfully submit that the amendment provided for in the bill is unnecessary and unwise, and that the law should be allowed to remain in its present form.[1]

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Rule Against Perpetuities — Rule Modified and Clarified — G. L. c. 184A.

JUNE 10, 1954.

His Excellency CHRISTIAN A. HERTER, *Governor of the Commonwealth.*

SIR: — You have submitted to me for examination and report enacted bill numbered Senate 823, entitled "An Act modifying and clarifying the rule against perpetuities."[2]

The purpose of the "Rule Against Perpetuities" is to prevent property from being tied up so that it is perpetually removed from commerce. Expressed in technical language, the rule is as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." The purpose of the rule is sensible, but after three centuries of existence the rule has become a technicality-ridden legal nightmare, dealing with problems of past centuries, and most frequently being applied at the present time to defeat reasonable dispositions of property.

The bill which has now been submitted to you for signature seeks to cure the three most common and most undesirable applications of the rule. The proposed bill adds new "Chapter 184A. The Rule against Perpetuities" to our General Laws. Section 1 of the new chapter provides that the validity of a future interest in property shall be determined on the basis of facts actually existing at the termination of the previous life estate, and not upon facts which *might have happened* but did not. Section 2 provides for automatic reduction of an age contingency in excess of twenty-one years down to twenty-one years if that excess is a violation of the rule. Section 3 will clear titles, frequently in churches, where the interest is encumbered by a possibility of future right of entry or of reverter if these possibilities do not occur within thirty years. The remaining sections of the new chapter are nontechnical and aim to carry out the provisions of the first three sections. The act is to become effective on January 1, 1955, and operates prospectively only.

The present bill has probably had as careful consideration as has been given to any bill in many years. Originally sponsored by experts in con-

[1] The proposed amendment was vetoed by the Governor and his veto was sustained. 1954 Acts and Resolves, page 813.

[2] Approved by the Governor on June 10, 1954, to become chapter 641 of the Acts of 1954.

veyancing and testamentary law, it has been studied and revised by many members of the bench and bar and the teaching profession, as well as by the specialized legal associations in Massachusetts dealing with these technical matters. A detailed article is contained in the June, 1954, issue of the Harvard Law Review (Vol. 67, pp. 1349–1366) under the title "Perpetuities Legislation, Massachusetts Style."

The bill appears to be in proper form, and if enacted into law would, in my opinion, be constitutional.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Public Construction Contract — Selection of General Contractor — Error in Listing Sub-bid Amount.

JUNE 15, 1954.

WILLIAM H. HARRISON, Jr., *Major General, AGC, Mass. NG Chairman, Armory Commission.*

DEAR SIR: — You have requested advice concerning the selection of a general contractor for the construction of an armory in Melrose.

The information supplied by you indicates that Grande & Son, Inc. filed the lowest bid in the amount of $369,958. Walter L. Ritchie filed the fifth lowest bid in the amount of $379,768. The Ritchie bid listed Warren Bros. as a subcontractor and carried the bid at $38,088.10. Subsequently, after the selection of Grande & Son as the general contractor, the filed sub-bids were opened. It then appeared that the Warren Bros. bid as filed was in the amount of $26,875. Ritchie asserts that his bid should be reduced by inserting the correct figure for Warren Bros., thus making him the lowest bidder.

You have asked whether the bid of Ritchie may or must be modified in accordance with this claim.

It is our opinion that the bid of Ritchie should not be so modified. In the case of *Gifford* v. *Commissioner of Public Health*, 328 Mass. 608, the court said, at page 615:

". . . after the time for filing has expired, a general contractor is bound by his bid as filed, and no form of testimony, written or oral, can be received to prove that the bid had some meaning not ascertainable on its face."

The bid filed by Ritchie is clear and unambiguous on its face. Its meaning cannot be changed by reference to other written or oral evidence.

It is noted that the provisions of G. L. c. 149, § 44C, state in part that

"No recorded sub-bids shall be opened by the awarding authorities until after the selection of the general contractor."

In accordance with this provision Grande & Son would already be selected as general contractor before the sub-bid of Warren Bros. was opened. Under the statute, the sub-bids would then be compared with the figures used by Grande & Son as the selected general contractor, but no occasion would arise to compare the sub-bids with the bid of Ritchie except in accordance with the provisions of section 44C (D) relating to

the substitution of subcontractors. No problem of substitution arises in the present case.

In summary, the awarding authority lacks power under Massachusetts statutory provisions to modify the bid of Ritchie under the circumstances stated. Federal funds are involved and Federal approval is necessary on this project. We express no opinion concerning the applicability of Federal laws or regulations concerning this problem.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By JOSEPH ELCOCK, JR.,
Assistant Attorney General.

Epileptic — Emergency Commitment to State Hospital — Procedure after Termination of Emergency.

JUNE 24, 1954.

JACK R. EWALT, M.D., *Commissioner of Mental Health.*

DEAR SIR: — You have recently asked this department for an opinion relative to the emergency commitment of an epileptic to the Monson State Hospital.

You state the following facts: The patient in question, who was suffering from epilepsy, but was not insane, was committed to the Monson State Hospital by the district court of Springfield. This commitment was made under the provisions of G. L. c. 123, § 69, which section adopts the procedural provisions of section 62 of that chapter. The examining physicians certified that the case was "one of emergency." The court thereupon ordered the commitment without a summons or hearing. This procedure is permitted by section 62. The patient is now being held at the Monson State Hospital by virtue of this emergency commitment order.

Under this set of facts you request an opinion as to the following question:

"As no other provision is made by the statutes for the emergency admission of persons with epilepsy to the Monson State Hospital except by the certification as such by the examining physicians under G. L. c. 123, § 62, and as the word 'emergency' generally denotes a situation for a brief period only, should such a committed case be returned to the court when physically and mentally able to do so to demand or waive the rights of a hearing as the case may be and subsequently become committed in due form?"

Your question is answered in the affirmative unless you are entitled to release the patient under the provisions of G. L. c. 123, § 89. Under the facts which you have submitted to me you have two alternatives: first, to release the patient under section 89; or, second, to return the patient to the court for further proceedings and for possible commitment in due form. Once the emergency has terminated it becomes your duty to take action under one or the other of these two alternatives. To continue to hold the patient after the emergency has ended would be a restraint without due process of law and would be a basis for a release on habeas corpus.

The grounds for release under section 89 are spelled out clearly in that statute. If these grounds exist, then action should be taken under such section. But before there is a release under section 89 you should give

notice of intention to release to the judge who signed the emergency commitment order, and also to the guardian of the patient and to other persons interested.

If there are no grounds for release under section 89, you or the superintendent of the State hospital should take steps to have the commitment confirmed or a new commitment made in due manner. There is no special procedure spelled out in chapter 123 for further proceedings after an emergency commitment under sections 62 and 69. A reasonable and safe procedure for you to follow in this case when the emergency is ended, is for you or the superintendent of the Monson State Hospital to present a formal request to the judge who signed the emergency commitment order, reciting the facts, stating that in your opinion the emergency is ended, and asking for the issuance of a summons to the patient and also for a hearing on the matter, and requesting a court order as to whether or not the patient shall be released or shall be committed under said sections 62 and 69.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

School Building Assistance Commission — School Construction Grant — Effect of Similar Federal Grant — Formula for Amount of State Aid.

JUNE 25, 1954.

Mr. JOHN E. MARSHALL, *Administrator, School Building Assistance Commission.*

DEAR SIR: — Your recent letter to the Attorney General makes inquiry as to the amount of school construction grant which can be made to the town of Bedford under the provisions of St. 1948, c. 645.

I understand from your letter that the town of Bedford has applied to your commission for a school construction grant under the provisions of St. 1948, c. 645, § 7, and that you are now called upon to determine the cost to which the formula in section 9 is to be applied. You state that the building is estimated to cost about $600,000. You also state that the sum of $170,000 has been granted to the town of Bedford by the United States under the provisions of U. S. C. Title 20, cc. 13 and 14, §§ 231–311. The purpose of this Federal grant is to provide assistance for the construction of urgently needed school facilities in school districts which have had substantial increases in school membership as a result of new or increased Federal activities.

Upon the basis of these facts you request an opinion as to the following question:

"In the determination of the amount of the State school construction grant to be made to the town of Bedford, should the School Building Assistance Commission deduct the amount of the Federal grant from the cost of the school?"

The answer to your question is in the negative. The formula which the Legislature has adopted to govern the amount of a school construction

grant is fixed by St. 1948, c. 645, § 9, as amended by St. 1954, c. 329. Under subdivision (*a*) of this section it is provided that "the total construction grant" shall be computed upon the basis of "the final approved cost of the project." There is no provision in this formula, nor in any other portion of the laws relating to the School Building Assistance Commission, which permits or authorizes the deduction from the "final approved cost" by reason of a contribution from the Federal Government or by reason of a gift of any kind. A statute of this kind calling for a contribution by the State toward the cost or expense of some approved project, in which the word "shall" is used, is a mandatory provision; always subject, of course, to money being appropriated therefor by the Legislature. *Milton* v. *Auditor of Commonwealth*, 244 Mass. 93. The duty of your commission is to certify to the Comptroller the amount due under the formula as actually adopted by the Legislature.

This interpretation is fully confirmed by the two cases, each entitled *Boston* v. *Commonwealth*, reported at 322 Mass. 177, and 322 Mass. 181. Such cases related to the obligation of the Commonwealth to reimburse a city or town "for one third of the amount of the aid given" under the Aid to Dependent Children Act. In those cases the Commonwealth contended that the amount of Federal funds received by the city for this purpose should be deducted before the one-third obligation of the Commonwealth was computed. This contention was overruled. The court stated:

"Nowhere does the statute base the Commonwealth's contribution on one third of the net expense incurred by the city, but on the contrary it fixes the extent of the contribution as 'one third of the amount of the aid given.' . . . The measure of the Commonwealth's liability is one third of the amount of aid given. We cannot read into the statute a reduction of that liability by giving the Commonwealth a credit by reason of the allocation of Federal funds. We are supported in this construction of the statute by the failure of the Legislature to change this proportion even after Federal grants were made . . . The share of the Commonwealth's contribution remained the same as it always had been. Federal grants were not to be included in a computation of the obligation to contribute to the town furnishing the aid, for the extent of that obligation continued as 'one third of the total amount disbursed.' The reimbursement of the city to the extent provided by the statute was mandatory and does not permit the deduction sought by the Commonwealth."

If the Legislature had intended another kind of formula it could have stated such intention in clear language. For example, there is a different formula stated in G. L. c. 74, § 1, with regard to reimbursement by the Commonwealth in connection with vocational education. In such section the obligation of the Commonwealth is based upon "the total sum raised by taxation" for such project.

In view of the definite formula stated in the statute relating to your commission, and the fact that in at least one other statute a formula which would have permitted deductions has been stated by the Legislature, and particularly in view of the constant scrutiny of the provisions of law relating to your commission and of the many amendments made to that law without there being any reference to deductions for Federal grants which presumably are familiar to the Legislature, the only answer which

can be given to your question is that in the determination of the amount of the State school construction grant to be made to the town of Bedford your commission cannot deduct the amount of the Federal grant from the cost of the school.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

State Employees — Compensation for Overtime — Who are "Heads of Departments and Divisions and Their Deputies and Assistants" under G. L. c. 149, § 30A.

JUNE 29, 1954.

Hon. JOHN A. VOLPE, *Commissioner of Public Works.*

DEAR SIR: — You have recently requested my opinion as to the validity of payments of compensation for overtime work heretofore made to the Chief Engineer and to the Director of Waterways of the Department of Public Works during the fiscal years 1952 and 1953.

Compensation for overtime work can validly be paid to certain employees of the Commonwealth under the provisions of G. L. c. 149, § 30A. But the two employees you mention would not have been entitled to overtime compensation unless they came within the provisions of said section 30A. That section excludes from its provisions "heads of departments and divisions and their deputies and assistants." The question you propound, therefore, turns upon whether or not the persons mentioned in your letter held positions which are excluded from section 30A by the above provision.

The duties of the Chief Engineer of the Department of Public Works have been specified and established, by the Division of Personnel and Standardization in the Commission on Administration and Finance in accordance with G. L. c. 30, § 45, as follows:

"CHIEF ENGINEER, PUBLIC WORKS DEPARTMENT

"Definition of Class; Duties: Subject to administrative approval, to direct the engineering activities of the Department of Public Works; to assist the Commissioner of Public Works in his administrative duties, to perform related work as required. Approved in Council, June 16, 1948."

In addition to the above formal specification, your inquiry and the material which you have sent to me state specifically that, during the fiscal years 1952 and 1953, the Chief Engineer of the Department of Public Works was the employee "assigned in the absence of the Commissioner to be in complete charge of the Department."

The position of Director of Waterways is provided for in G. L. c. 16, § 5A. That section creates a Division of Waterways in the Department of Public Works. The section then provides:

"The commissioner shall with the approval of the governor, appoint a director to have charge of the work of the division . . . The director shall . . . devote his entire time to the work of the division."

It is clear, from the respective duties assigned to these two men by the statutes and by the specifications provided for by statute, that these men held positions of "heads of departments and divisions and their deputies and assistants" which are excluded from section 30A. Neither of these men, therefore, was entitled to compensation for overtime work performed.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Board of Registration of Hairdressers — Refund of Fee if Examination is not Taken.

JUNE 29, 1954.

MRS. HAZEL G. OLIVER, *Director of Registration.*

DEAR MADAM: — You have recently asked this department for an opinion regarding the refund of money paid by an applicant as a fee for taking an examination.

Your question involves the interpretation of the provisions in chapter 112 of the General Laws relating to the registration of hairdressers. In sections 87V, 87W, 87X and 87BB, dealing with operators, hairdressers, demonstrators, manicurists and instructors, there are procedural requirements for an application for registration, "accompanied by an examination fee," for examinations, and for registration. Section 87II of this chapter provides for a penalty in case a person not duly registered by the Board of Registration of Hairdressers engages in any of the occupations covered by these sections.

You call my attention to section 87KK, added by St. 1951, c. 509, which provides that every applicant shall receive notice prior to an examination, and then provides that:

"If the applicant does not appear for any one of three examinations of which he is notified, the examination fee, as provided in section eighty-seven CC, shall be retained by the board, and thereafter such applicant shall register anew as provided in sections eighty-seven T to eighty-seven JJ, inclusive. . . ."

I understand from your letter that an applicant has received a notice of an examination but has failed to appear for the examination, and such applicant has made a request for refund of the money paid as an examination fee. Upon the basis of these facts you ask the following question:

"If the applicant applies for a refund any time before taking the examination, but after having received any one of his notices, is the department obliged to refund the money?"

The answer to the above question is in the negative. There is nothing in any of the sections relating to registration of hairdressers, sections 87T to 87KK inclusive, which either expressly or impliedly requires the board to refund an examination fee paid by an applicant. The reference in the new section 87KK that under certain circumstances the examination fee "shall be retained by the board" does not mean that in other circumstances the examination fee is to be refunded. This provision in section 87KK merely provides that, at a certain time and under certain circumstances,

that examination fee paid by the applicant is to be retained by the board and that thereafter the applicant in question must pay a new fee in order to be entitled to take an examination.

The payment of a fee to the Board of Registration of Hairdressers covers many services of the board of a clerical and administrative nature. Many of these duties are performed even in connection with an applicant who fails to appear for an examination. Under the circumstances which you have set forth in your letter there is no obligation upon the board to refund the examination fee paid.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

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